



Law and Practice

Contributed by:

Alex Saleh, Asad Ahmad, Habiba Wahdan and Rana Moustafa
GLA & Company

Contents

1. Legislation and Enforcing Authorities p.5

- 1.1 Merger Control Legislation p.5
- 1.2 Legislation Relating to Particular Sectors p.6
- 1.3 Enforcement Authorities p.7

2. Jurisdiction p.7

- 2.1 Notification p.7
- 2.2 Failure to Notify p.7
- 2.3 Types of Transactions p.8
- 2.4 Definition of "Control" p.10
- 2.5 Jurisdictional Thresholds p.10
- 2.6 Calculations of Jurisdictional Thresholds p.10
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.11
- 2.8 Foreign-to-Foreign Transactions p.12
- 2.9 Market Share Jurisdictional Threshold p.12
- 2.10 Joint Ventures p.12
- 2.11 Power of Authorities to Investigate a Transaction p.12
- 2.12 Requirement for Clearance Before Implementation p.13
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.13
- 2.14 Exceptions to Suspensive Effect p.13
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.13

3. Procedure: Notification to Clearance p.13

- 3.1 Deadlines for Notification p.13
- 3.2 Type of Agreement Required Prior to Notification p.14
- 3.3 Filing Fees p.14
- 3.4 Parties Responsible for Filing p.14
- 3.5 Information Included in a Filing p.14
- 3.6 Penalties/Consequences of Incomplete Notification p.15
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.15
- 3.8 Review Process p.15
- 3.9 Pre-notification Discussions With Authorities p.16
- 3.10 Requests for Information During the Review Process p.16
- 3.11 Accelerated Procedure p.16

4. Substance of the Review p.16

- 4.1 Substantive Test p.16
- 4.2 Markets Affected by a Transaction p.17
- 4.3 Reliance on Case Law p.17
- 4.4 Competition Concerns p.17
- 4.5 Economic Efficiencies p.17
- 4.6 Non-competition Issues p.17
- 4.7 Special Consideration for Joint Ventures p.18

5. Decision: Prohibitions and Remedies p.18

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.18
- 5.2 Parties' Ability to Negotiate Remedies p.19
- 5.3 Legal Standard p.19
- 5.4 Negotiating Remedies With Authorities p.19
- 5.5 Conditions and Timing for Divestitures p.19
- 5.6 Issuance of Decisions p.19
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.20

6. Ancillary Restraints and Related Transactions p.20

- 6.1 Clearance Decisions and Separate Notifications p.20

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.20

- 7.1 Third-Party Rights p.20
- 7.2 Contacting Third Parties p.20
- 7.3 Confidentiality p.21
- 7.4 Co-operation With Other Jurisdictions p.21

8. Appeals and Judicial Review p.21

- 8.1 Access to Appeal and Judicial Review p.21
- 8.2 Typical Timeline for Appeals p.22
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.22

9. Foreign Direct Investment/Subsidies Review p.22

- 9.1 Legislation and Filing Requirements p.22

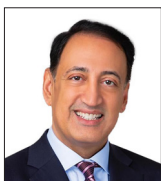
10. Recent Developments p.22

- 10.1 Recent Changes or Impending Legislation p.22
- 10.2 Recent Enforcement Record p.22
- 10.3 Current Competition Concerns p.22

GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE, it offers unique insights for companies seeking to establish or expand business operations in

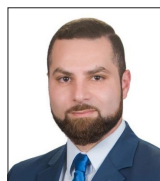
these nations. The firm's emphasis on deals is to get them cleared with the local competition authority and it has excellent relationships with regulators in the GCC. GLA has been successful in securing no objections from these bodies to clear deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments and committees on behalf of clients.

Authors



Alex Saleh is the managing partner of GLA & Company and takes a leading regional role in the firm concerning its M&A and private equity practice. With over 25 years of experience in

both the GCC and the US, he has accumulated sizable expertise in the areas of banking and finance, M&A, capital market deals, and infrastructure projects. His experience garners praise from the leading legal directories, and his transactions regularly win Deals of the Year from the same institutions and organisations.



Asad Ahmad is the head of the antitrust & competition practice at GLA & Company and has been involved in a number of transactional and advisory works in various industries,

including logistics, construction, finance, healthcare and education. His practice has involved comprehensive representation with regard to M&A, conducting extensive due diligence exercises in relation to complex transactions, as well as distribution and agency arrangements. Asad has an extensive background in advising on the marketing of securities, corporate governance issues, policies and regulatory compliance, and he has expanded his expertise to include advising on data protection and regulation.

Contributed by: Alex Saleh, Asad Ahmad, Habiba Wahdan and Rana Moustafa, **GLA & Company**



Habiba Wahdan is an associate at GLA & Company, specialising in M&As, corporate advisory, antitrust, data protection, finance and banking. Habiba

has successfully advised top clients across the Middle East region in different industries, including media, oil & gas, banking, automotive, pharmaceuticals, education, industrial and finance sectors.



Rana Moustafa is an associate at GLA & Company with extensive experience in international and domestic commercial disputes. Rana's experience spans across the

GCC and Europe, representing clients in Kuwait, Lebanon, Qatar, United Arab Emirates, Saudi Arabia, Egypt and France. She has experience in international and domestic arbitration, working on matters held under the auspices of ICC/DIFC-LCIA/CRCICA/DIAC/ICSID and CAS. Rana extended her experience in data protection while working on matters related to data protection disputes, data protection framework at the workplace and data protection policies for clients. She is a member of the Egypt Bar Association and is currently studying for the French Barreaux.

GLA & Company

24th Floor
Al Sila Tower
Abu Dhabi Global Market Square
Al Maryah Island
Abu Dhabi
United Arab Emirates

Tel: Kuwait +965 669 55516 / UAE +971 54 997 4040
Email: alex.saleh@glaco.com
Web: www.glaco.com/attorneys/alex-saleh/



1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Four pieces of legislation should be read together to understand the framework of antitrust and merger control in the UAE. This legislation significantly interlinks to display the bigger picture for complying with the antitrust and merger control regulatory requirements. The following list details the relevant legislation, and can be called the “UAE Competition Legislation”:

- Federal Law No 36 of 2023 concerning the Regulation of Competition (the “Competition Law”);
- Cabinet Resolution No 37 of 2014 – Implementing Regulations of the Competition Law (the “Competition Regulations”);
- Cabinet Resolution No 13 of 2016 on the Rates and Rules Applying to the Competition Law (the “Competition Threshold Rules”); and
- Cabinet Resolution No 22 of 2016 on Unified Definition of Small and Medium Enterprises (the “SME Definition Decision”).

It is important to note that the implementing regulations of the Competition Law have not yet been issued. Consequently, according to Article 39 of the Competition Law, the existing Competition Regulations and any other resolutions related to the previous competition law will remain in effect until their replacements are issued. The authors anticipate the new implementing regulations to be issued shortly, as the Ministry must issue such regulations within six months from the date the Law took effect.

The Competition Law and Competition Regulations regulate merger control, prohibitions on antitrust arrangements, and abuse of a dominant position. Abuse of a dominant position includes

predatory pricing, discriminating among customers without objective justification, refusal to supply, limiting production, failure to satisfy demand, and tying arrangements.

The Competition Law further provides that the aim of the law is to protect and enhance competition in the UAE and to combat monopoly practices through:

- providing a stimulating environment for businesses to enhance efficiency, competitiveness and the interest of consumers, and to achieve sustainable development in the UAE; and
- sustaining a competitive market governed by the market’s mechanisms through the principle of economic freedom by way of banning restrictive agreements, banning the businesses and actions that lead to the abuse of a dominant position, controlling the operations of economic concentrations, and avoiding everything that may create prejudice within, limit, or prevent competition.

Meanwhile, the Competition Threshold Rules define what is meant by “dominance” and set out the relevant antitrust and merger control filing thresholds.

The relevance of the SME Definition Decision, on the other hand, is limited to defining small and medium enterprises exempt from the application of the Competition Law.

It should be noted that both the Competition Law and the Competition Regulations are, theoretically speaking, largely based on EU Competition Law and reflect many elements of the international best practice norms (including the US). However, it could also be said that the law would only apply if the thresholds under the Competi-

tion Threshold Rules are met, which are higher than most (if not all) of the jurisdictions in the Gulf and Middle East regions.

It is important to highlight that antitrust and merger control rules and restrictions under the UAE Competition Legislation (to be discussed later) do not apply to undertakings in Abu Dhabi Global Market (ADGM) or Dubai International Financial Centre (DIFC). This is despite Article 3 of the Competition Law providing that the law shall apply to all undertakings with regards to their economic activities in the UAE and exploitation of intellectual property rights inside or outside the UAE, thereby affecting competition in the UAE.

The reason why the UAE Competition Legislation does not apply to undertakings in such financial free zone areas, can be legally justified via Article 121 of the UAE Constitution, which enabled the UAE federation to create financial free zones in the UAE, and most importantly, to exclude the application of certain federal laws in these financial free zones. Furthermore, Federal Law No 8 of 2004 on Financial Free Zones in the UAE further provides that financial free zones are exempt from all federal civil and commercial laws.

Neither ADGM nor DIFC have separate legislation to regulate antitrust or merger control. Accordingly, it is safe to assume that the UAE Competition Legislation applies only to onshore UAE undertakings and exclude financial free zone undertakings unless the activities or transactions taking place via an undertaking based in either of the two financial free zones (ie, ADGM or DIFC) affect the competition in the UAE mainland, whether directly, indirectly, or through an onshore-based subsidiary.

1.2 Legislation Relating to Particular Sectors

Sectors and Exemptions

The UAE Competition Legislation applies to all undertakings operating in the UAE, as well as to activities that take place abroad and have an affect on competition in the UAE commercial activities and transactions for both local and international undertakings.

It should be noted that the following are exempt from the application of the UAE Competition Legislation.

- Any agreement, practice or action related to a specific good or service in whose respect the authority to regulate competition rules is granted, by virtue of another law that includes provisions related to regulating the rules and procedures for considering anti-competitive practices and cases of their exemption and economic concentration operations, to a sectoral regulatory body, unless the sectoral regulatory body requests in writing the ministry to take over this matter, in whole or in part, and the ministry agrees to that.
- Establishments owned by the federal government and that are determined by a cabinet decision based on the minister's proposal after coordination with the concerned authority.
- Establishments owned by one of the Emirates' governments, operating within the Emirate, and which are determined by a decision issued by the local government.

Small and Medium Enterprises (SMEs)

The Competition Law repealed the exemption of the SMEs which was stated in the Law No 4 of 2012.

1.3 Enforcement Authorities

The UAE Competition Legislation provides that the responsibility for enforcement lies with the Competition Department at the UAE Ministry of Economy (the “Competition Department”). The performance of the Competition Department is supervised by the Competition Regulation Committee, chaired by the Undersecretary of the Ministry of Economy (the “Competition Committee”).

Both the Competition Committee and the Competition Department report to the UAE Federal Minister of Economy (the “Minister”), who heads the UAE Federal Ministry of Economy (the “Ministry”).

2. Jurisdiction

2.1 Notification

Pursuant to the Competition Law, economic concentration is realised if:

- the total annual sales value of the parties in the relevant market during the last fiscal year exceeds the amount determined by the UAE council of ministers; and
- the total share of the parties exceeds the percentage of the total transactions in the relevant market during the last fiscal year determined by the UAE council of ministers.

The implementing regulations of the new Competition Law will establish the guidelines for submitting economic concentration applications, the required documents that shall be attached thereto, and the mechanisms for examining the application. Since these implementing regulations have not yet been issued, we must adhere to the Competition Threshold Rules. These rules specify that, economic concentration, such as

total or partial alienation, merger, or acquisition, is realised if the total transactions of a certain undertaking in the relevant market are more than 40%.

For activities or transactions meeting such a threshold, filing the notification becomes compulsory. Otherwise, there is no requirement for a voluntary notification if such a threshold is not met.

For the purposes of filing the notification, the filing is made to the Competition Department and attached to it, amongst other things, is an economic report explaining the positive impact of the required exemption. The Competition Department will then assess the requested exemption and submit a report to the Committee. The Minister of Economy, who will decide on the requested exemption within 90 days of notification of the request for exemption. This deadline may be extended by an additional 45 days. If the Minister does not issue his decision by the specified deadline, the notified activity or transaction will be deemed by law to be exempt.

On the other hand, no notification is required if the activity or transaction is relevant to “Sectors and Exemptions” in **1.2 Legislation Relating to Particular Sectors**.

2.2 Failure to Notify

Failure to notify a reportable economic concentration transaction may result in a fine between 2% and 10% of the turnover generated in the UAE by the relevant undertaking during the last financial year or, if such data is not available, a fine will be imposed between AED500,000 and AED5 million.

Nevertheless, as far as we are aware, the Ministry has never disclosed any penalties that have

been imposed for violating an economic concentration transaction. Penalties imposed by the Ministry usually become public when disclosed via the Ministry's official channels (ie, websites and social media pages) in addition to the local newspapers, which are likely to pick up immediately on such news.

2.3 Types of Transactions

Competition Law

The Competition Law has three defined terms key to understanding the regulatory framework of merger control in the UAE.

The first definition is "relevant market", which means, "The market that is based on two elements:

- Concerned Products – the product or service or all products or services which are, in view of their prices, characteristics and uses, interchangeable to meet a particular need of the consumer.
- Specific Geographical Location – it means the physical or digital place where supply and demand converge for a product or service and where competition conditions are similar or homogeneous."

The second is the definition of "economic concentration", which is "any act resulting in a total or partial transfer (merger or acquisition) of a property, usufruct rights, rights, stocks, shares or obligations from an undertaking to another, empowering the undertaking or a group of undertakings to directly or indirectly control another undertaking or another group of undertakings".

As mentioned previously and pursuant to the Competition Threshold Rules, economic concentration exists if the relevant person(s) or

undertaking(s) exceeds 40% of the total transactions of the relevant market in the UAE. The definition of economic concentration is wide and includes several types of transactions, such as internal restructuring or reorganisation. The Competition Law does not consider control as a determining factor for triggering the regulatory requirement for notification. Rather, the determining factor will always be whether or not such transactions create dominance or economic concentration.

Transactions not involving the transfer of shares or assets (such as shareholders' agreements, and changes to articles of association) can still be caught under the auspices of the UAE Competition Legislation if considered a "restrictive agreement" or if it leads to an abuse of a dominant position.

This brings us to the third significant term which is the definition of "agreements", defined as "agreements, arrangements, coalitions, or practices between two undertakings or more or any co-operation among establishments or resolutions issued by undertakings' consortiums whether they are written or oral, explicit or implicit, or public or confidential".

The Competition Law considers agreements between undertakings which aim to create prejudice within, limit, or prevent competition in the UAE as "restrictive agreements", especially those:

- specifying the prices for buying or selling commodities or services, directly or indirectly, by creating the increase, decrease or stabilisation that may negatively affect the competition;

- specifying the conditions of buying, selling, or performing of services, and/or any other similar obligation;
 - colluding in bids, tenders, practices, or any other supplying offers;
 - phasing out or limiting the operations of production, development, distribution, or marketing, or any other aspects of investment;
 - colluding to refuse to buy from or to sell or supply to certain undertaking(s) and to halt or impede such undertaking(s) from carrying out their activities or transactions;
 - limiting the freedom of commodities or services flow to the relevant market(s) or withdrawing them from the market, including the concealment or storage of such commodities or services unlawfully, abstaining from dealing with such commodities or services or suddenly creating their abundance that may lead to trading such commodities or services with unreal prices;
 - dividing markets or assigning clients based on geographic areas, distribution centres, quality of clients, seasons and time, or any other basis that may negatively affect competition; and/or
 - taking procedures to hinder the entrance of undertakings to the market, exclude such undertakings from the market, or hinder joining existing agreements or coalitions.
- ing them from such markets, or causing them losses, preventing them from continuing their activities in such markets;
 - discriminating without justification amongst clients with identical contracts with regards to prices of such commodities or services, or the terms and conditions of buying or selling contracts;
 - obliging a client not to deal with a competitive undertaking;
 - the total or partial rejection to deal according to the usual commercial conditions;
 - unjustifiably abstaining from dealing in commodities or services through buying or selling, or limiting or hindering such dealing that may lead to imposing an unreal price of such commodities or services;
 - suspending the buying or selling of commodities or services unless other commodities or services are received in return which, by nature or commercial use, the latter commodities or services to be received in consideration are irrelevant to the original transaction in its normal business course;
 - intentionally publishing incorrect information about commodities or prices;
 - decreasing or increasing the available supply of the commodity to create a false scarcity or abundance of such commodity;
 - controlling or limiting production, markets, or technological development; or
 - unjustifiably preventing or obstructing other undertakings from accessing its own networks, facilities, or any physical or digital infrastructure it owns or exploits if this is the only basic and economically feasible solution for practicing economic activity or entering the relevant market.

Determining whether any undertaking is abusing its dominant position in the relevant market(s), the Competition Department will consider if such undertaking is:

- imposing the prices or conditions of reselling commodities or services directly or indirectly;
- selling a commodity or performing a service with a price less than the actual cost with the aim of hindering competitive undertakings from entering the relevant markets, exclud-

To conclude the above, the triggering factors to consider whether transactions not involving the transfer of shares or assets are a restrictive

agreement or an abuse of a dominant position would be:

- whether the relevant undertakings meet the threshold identified in the Competition Threshold Rules, which is always the first step; and
- if yes, determine whether the activity or transaction captures any of the above prohibitions.

2.4 Definition of “Control”

Control is not a defined term under any of the UAE Competition Legislation. Control in the context of UAE merger control would be relevant only in two instances.

The first is the percentage of control required by UAE federal or local governments over undertakings to consider whether or not such undertakings are exempted from the application of the UAE Competition Legislation. So, if the control, directly or indirectly, by the federal or local government over an undertaking is 50% or more, then such undertaking is exempted from the UAE Competition Legislation. If the said control is less than 50%, then it will need to meet the threshold under the Competition Threshold Rules before being captured by the requirements or prohibitions of the Competition Law.

The second is to identify the controlling undertaking in the event of economic concentration as determined under the Competition Law. The purpose of identifying the controlling undertaking is to name it as being responsible for complying with the regulatory requirements under the UAE Competition Legislation.

2.5 Jurisdictional Thresholds

As previously stated, the Competition Law includes turnover and market share thresholds, the amounts and percentages of which shall be

defined in the forthcoming implementing regulations. In the interim, the three jurisdictional thresholds under the Competition Threshold Rules shall be adhered to, which, if met, then require the regulatory notification requesting exemption in addition to the other obligations and restrictions under the UAE Competition Legislation. These jurisdictional thresholds are as follows.

- “Restrictive agreements” – if such agreements represent 10% or more of the total transactions of the undertaking in the relevant market with regards to a specific product and/or service.
- “Dominant position” – is assumed if the market share of an undertaking exceeds 40% of its transactions in the relevant market with regards to a specific product and/or service.
- “Economic concentration” – is when the economic concentration transaction leads the undertaking to control more than 40% of the total transactions in the relevant market with regard to a specific product and/or service.

It is worth mentioning that “total transactions” are defined under the general principles of EU competition laws (on which the Competition Law is significantly based) as the total value of sales of goods or services in the relevant market. On the other hand, no special jurisdictional thresholds would apply to particular sectors, and the above applies across all sectors and regions in the UAE. It is important to reiterate that the jurisdictional thresholds do not apply to Exempted Activities & Enterprises.

2.6 Calculations of Jurisdictional Thresholds

None of the UAE Competition Legislation has identified how jurisdictional thresholds are calculated (including how sales or assets booked

in a foreign currency are converted or if the threshold is based on the book or fair market value). There is also no sufficient data, due to the absence of case law, to understand how the Competition Department would carry out such calculations.

The absence of case law could be justified by:

- the high jurisdictional thresholds usually not met by the undertakings based or doing business in the UAE, and accordingly do not require any filings or notifications requesting exemptions;
- the huge volume of economic concentration transactions and activities taking place in financial free zones, such as ADGM or DIFC, exempted from the UAE Competition Legislation;
- many of the undertakings are carrying out activities that are categorised as Exempted Activities & Enterprises; and
- the several incentives provided by the UAE government to promote the UAE as a regional hub leading to relaxing some of the regulatory restrictions usually found in developed markets, which, at the same time, would not apply to the UAE, considered one of the most competitive emerging markets in the Gulf and Middle East regions.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

It is important to clarify that an “undertaking” is defined under the Competition Law as “any natural or legal person conducting an economic activity or any person in connection with such persons or any grouping of these persons regardless of their legal form”. No other definitions are provided under the UAE Competition

Legislation with regards to corporate entities or individuals, or group-wide.

This means that the undertaking meeting the threshold could be the undertaking directly involved in the economic concentration transaction or activity, or it could be a parent or holding company based outside the UAE.

Strictly speaking, the undertaking that is directly carrying out an economic concentration transaction or activity in a relevant market, whether based inside or outside the UAE, and meets the jurisdictional threshold, as an entity and not as a group, will have to notify the Competition Department requesting an exemption.

However, if we apply the same principles used in the EU, the calculation of the jurisdictional thresholds should be carried out after consolidating the turnover of the transactions of the group as a whole, not just the undertaking that is a party to the transaction.

Unfortunately, due to the absence of case law and the regulatory guidance on the calculation methodology, it is unclear if the Competition Department would strictly follow the wording of the Competition Law or apply the same interpretation followed under the general principles of EU competition laws, including the method of reflecting changes in the business during a reference period (such as other acquisitions, divestments, or business closures).

Therefore, the safe approach is to consult the Competition Department prior to concluding an economic concentration transaction where there are grounds to believe that the jurisdictional thresholds are met at the group level but not at the level of the undertaking.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions by way of sale, acquisition, or merger (whether shares or assets) are captured under the auspices of the UAE Competition Legislation once the jurisdictional thresholds under the Competition Threshold Rules are met, regardless of the location or nationality of the parties, and subject to the local effects test (ie, the parties carrying out their activity or transaction in a relevant market or engaging in activities or carrying out transactions that have harmful effects on competition in the UAE).

In general, 100% foreign ownership of UAE onshore companies is allowed, subject to restrictions or prohibitions on foreign investment for companies engaging in activities which have a strategic impact.

The Economic Departments in the Emirates of Dubai and Abu Dhabi have published lists of more than 1,000 commercial and industrial activities which do not have a “strategic impact”. Companies incorporated in these Emirates that are engaged in non-strategic activities are open to full foreign ownership.

2.9 Market Share Jurisdictional Threshold

As per the Competition Law there will be a market share threshold which will be determined in the implementing regulation. If it is met, notification becomes compulsory pursuant to the Competition Law and in accordance with the Competition Regulations.

2.10 Joint Ventures

Joint ventures are subject to the same restrictions and prohibitions applicable to any other activity or transaction. As long as the joint venture does not contain any condition making such

arrangement a restrictive agreement or an economic concentration, the joint venture will not trigger any of the regulatory requirements under the UAE Competition Legislation to notify the Competition Department requesting an exemption.

If the joint venture is labelled as a restrictive agreement or an economic concentration, the filing of the notification becomes a regulatory requirement.

It is clear that filing the regulatory notification is first subject to meeting the jurisdictional threshold under the Competition Threshold Rules as an initial step and even prior to checking whether the joint venture is defined as a restrictive agreement or an economic concentration.

2.11 Power of Authorities to Investigate a Transaction

According to the Competition Regulations, the Competition Department has full power and authority to investigate, on its own initiative or following complaints submitted by third parties, complaints of a possible violation of competition practices and competition-related activities and transactions.

There is no limitation with regards to the Competition Department’s ability to investigate an activity or a transaction. During the investigation, the Competition Department can either hold interviews or request information from the enforcement or competent authorities in the UAE. Following the investigation, the department prepares a report and submits it to the Minister to issue a decision.

2.12 Requirement for Clearance Before Implementation

Following the receipt of the regulatory notification, the Competition Department will assess it and ensure that it meets the formal requirements under the Competition Regulations. After assessing the notification, the Competition Department will notify the Minister to issue a final decision.

Legally speaking, a transaction (if it meets the regulatory thresholds and is considered by law an economic concentration transaction) should not be completed without obtaining clearance from the Minister. From a procedural point of view, a transaction could still be completed without such clearance since the federal and local authorities will not require it as part of the documents needed to effect a transaction in the public records and relevant constitutional documents such as commercial licences, commercial registries, notarised share transfer agreements, etc.

There is a clear prohibition in the Competition Law prohibiting the relevant undertakings from concluding any transactions during the merger control review period. Therefore, obtaining the clearance from the Minister is usually included as a condition precedent in the agreements of an economic concentration transaction, making it conditional to obtaining the clearance for closing the transaction.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Failing to comply with the regulatory requirement to suspend the implementation of a transaction during the merger control review, until:

- a clearance is obtained; or
- the specified deadline expires,

this will lead to imposing a fine of no less than AED50,000 and no more than AED500,000.

2.14 Exceptions to Suspensive Effect

There are no exceptions under the UAE Competition Legislation to the suspensive effect of the regulatory notification.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Implementation before clearance is not permitted under the Competition Law.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is uncertainty regarding the precise time when the transaction must be notified to the Competition Department. The Competition Law provides that economic concentration transactions have to be notified at least 90 days before completion of the transaction.

Practically speaking, notifications should be made shortly after entering into the transaction documents since it is usually a condition precedent to obtain the regulatory approval prior to closing. In this case, the applicant would comply with both the Competition Law and the Competition Regulations.

As previously mentioned, failing to notify a reportable economic concentration may result in a fine between 2% and 10% of the turnover generated in the UAE by the relevant undertaking during the last financial year or, if such data is not available, a fine will be imposed between AED500,000 and AED5 million.

3.2 Type of Agreement Required Prior to Notification

The new implementing regulation of the Competition Law shall determine the required documents and the procedures. However, in the meantime we should abide by the Competition Regulations which indirectly require a binding agreement prior to the notification for approving an economic concentration transaction. As part of the notification made to the Competition Department, it is required to attach a term sheet or an agreement, whether in an executed or draft form.

Therefore, a less formal agreement such as a letter of intent or memorandum of understanding can be attached to the notification. In all events and for the purposes of the notification, a written document should be provided explaining the transaction, whether in a signed or a draft form. Without it, the Competition Department would most likely put the application on hold until the term sheet or agreement is submitted as part of the notification filing.

3.3 Filing Fees

There are no fees for filing the regulatory notification.

3.4 Parties Responsible for Filing

According to the Competition Regulations, the regulatory filing for an economic concentration is made by the relevant undertaking. There is no clear definition of what is meant by relevant undertaking(s). It could be interpreted from the text that a relevant undertaking would be:

- the undertaking directly involved in the transaction; and
- meeting the jurisdictional threshold following the conclusion of the economic concentration transaction.

If more than one undertaking meets the above requirements, then filing should be made jointly.

Refer to **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

3.5 Information Included in a Filing

As mentioned, the new implementing regulations shall include all the filing documents and procedures. However, in the meantime the authors shall adhere to the competition legislation, which includes the following:

In addition to:

- the notification form (which is still to be released by the Competition Department and, therefore, up to the date of this guide, notifications could be submitted in the form that the relevant undertaking deems appropriate as long as it complies with the regulatory requirements); and
- the term sheet or agreement, whether executed or in a draft form,

the relevant undertaking(s) must also submit the following as part of the notification filing:

- constitutional documents of the relevant undertaking(s), including their memorandum and articles, which have to be duly attested;
- audited consolidated financial statements of the relevant undertaking(s) for the past two years;
- shareholders' register of the relevant undertaking(s); and
- an economic report analysing the positive impact of the transaction.

The notification form, term sheet or agreement (whether executed or in draft form), and the

aforementioned attachments should be submitted in Arabic. An English translation of the notification form can also be filed, but practically speaking, the Competition Department will only refer to the Arabic documents and disregard the English copy.

The Competition Regulations require three hard copies of the notification with the attachments to be submitted. However, practically the Competition Department now accepts the notification and attachments to be sent in an electronic form, and it is no longer necessary to submit hard copies. If some of the documents or information in the notification or its attachments are confidential, the relevant undertaking(s) may refer the Competition Department to such confidential information and may also submit a non-confidential summary of the same to maintain it. Additional documents and information can be requested by the Competition Department during the process of the merger control review.

3.6 Penalties/Consequences of Incomplete Notification

There is no penalty for an incomplete notification if it was an honest mistake or done in good faith. The only consequence is that the Competition Department will not assess or analyse it until all documents are submitted, whether required by law or further requested by the Competition Department.

It is important to note that the 90 days' timeframe, during which a decision should be issued and could be extended for an additional 45 days for this purpose, will not start until the Competition Department considers the notification complete, and this can only happen when all documents and information requested by the Competition Department are submitted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

A provision under the UAE Federal Crimes and Penalties Law No 21 of 2021 states that imprisonment and/or a fine will be imposed on anyone who, in bad faith, makes a false statement to a judicial or administrative authority. Nonetheless, none of the above penalties should apply if the inaccurate information was provided by way of an honest mistake or on a good faith basis where the applicant honestly believed that such information was true and accurate. Inaccurate information should be promptly rectified and updated once it is known to the relevant undertaking that such inaccurate information was provided.

3.8 Review Process

The review process will be defined in the new implementing regulations of the Competition Law. Until these regulations are issued, the procedures will be carried out in two phases. The first phase is carried out by the Competition Department, ensuring first that the notification is complete and includes all the relevant information and documents. To ensure the completeness of the notification, the Competition Department may require the relevant undertaking(s) and any other concerned party, as the Competition Department would deem appropriate, to provide the necessary information or documents or to attend interviews with the Department. Consultations with other authorities in the UAE may also be made for the assessment.

Once all required documents and information are provided, the Competition Department will then prepare a detailed report on the economic concentration transaction notified. The report will include:

- a statement of all procedures and actions taken;

- the underlying data;
- the results of the assessment from both legal and economic aspects, especially with regard to the positive and negative effects of the transaction on the competition in the relevant market; and
- the recommendation(s) of the Competition Department and proposed decision to be made by the Minister.

The second phase would be submitting the detailed report to the Minister for his review and final decision.

In all events, the process should not be longer than 90 days which could be extended for an additional 45 days; otherwise, approval should be assumed to be granted if no decision is made during this timeframe. Such a timeframe begins once all necessary documents and information are provided, and no further engagement is required with the Competition Department to prepare the detailed report.

3.9 Pre-notification Discussions With Authorities

Discussions and engagement with the Competition Department are carried out with:

- the relevant undertaking(s) directly concerned with the transaction;
- other undertakings or third parties believed by the Competition Department to be affected, directly or indirectly, by the transaction; and
- other UAE authorities, consultants or third parties as the Competition Department deems appropriate.

Such discussions could be notified to the relevant undertaking(s) or remain confidential. The Competition Department has full discretion to

engage in the way it believes to be in the best interest of all concerned parties.

3.10 Requests for Information During the Review Process

There is no regulatory limitation or threshold as to the number of requests that the Competition Department could make during its course of reviewing the documents and information required for reviewing the notification.

The Competition Department is entitled by law to request any number of interviews or any volume of documents or information from any of the concerned parties that the Department deems appropriate for its review.

Once the Competition Department declares that it has all the information it needs to prepare its detailed report, the 90 days clock starts counting down, although it could be extended by an additional 45 days.

There is no clarity on how common or burdensome some of these requests could be; however, practically speaking, it is highly likely to be reasonable and essential for adequately and accurately assessing the notification.

3.11 Accelerated Procedure

There is no short-form or fast-track, or other types of accelerated procedure for reviewing the notification. The process is for any and all economic concentration transactions.

4. Substance of the Review

4.1 Substantive Test

The substantive test employed by the Competition Department considers the below criteria during the course of reviewing the notification:

- actual and potential competition in the relevant market;
- new undertakings' ease of access to the relevant market;
- the extent of the potential impact on prices of relevant commodities or services;
- whether there are systemic barriers affecting the entry of new competitors;
- how likely the emergence is of a dominant position in the relevant market;
- the extent of the potential impact on innovation, creativity, and technical competence;
- the extent of contribution required to promote investment or export, or support UAE undertakings' ability to compete in the international marketplace; and
- the extent of the impact on consumers' interests.

It is important to note that these criteria might be amended after the issuance of the new implementing regulations.

4.2 Markets Affected by a Transaction

Pursuant to the new UAE Competition Law, the market share is the total share of the parties' transactions as compared to the percentage of the total transactions in the relevant market during the last fiscal year determined by the UAE Council of Ministers and as per the Competition Threshold Rules. An economic concentration is created if the market share of the undertaking(s) exceeds 40% of the total transactions in a relevant market of goods or services that are interchangeable based on their price, characteristics and usage in the relevant market.

As such, the Competition Department will usually first identify the relevant market and then measure the market share in terms of the aggregate turnover of the relevant undertaking(s), divided

by the total value of sales of the products or services pertaining to the relevant market.

As explained previously, "total transactions" is not defined under the UAE Competition Legislation, but could be interpreted as the combined annual turnover of the undertaking(s) from the total sales of the products or services pertaining to the relevant market.

4.3 Reliance on Case Law

Unfortunately, the case law of UAE merger control is rare and not publicly available due to the high threshold causing limited application of the law. Therefore, reliance up to the date of this guide is heavily weighted on the interpretation of the UAE Competition Legislation.

4.4 Competition Concerns

Please refer to 4.1 Substantive Test.

4.5 Economic Efficiencies

Please refer to 4.1 Substantive Test.

4.6 Non-competition Issues

There are seven strategic sectors in which foreign investment is restricted or prohibited, according to Cabinet Decision No 55 of 2021 on the Determination of the List of Strategic Impact Activities. The restricted or prohibited sectors include security and defence, banks and insurance, and telecommunications. If the regulatory authority for the relevant sector approves the application by a foreign investor who wishes to invest in a company engaged in one of these sectors, it must determine the minimum percentage of share capital that must be held by UAE shareholders and the maximum percentage that may be held by the foreign shareholder.

However, sector regulators and other government authorities in the UAE retain a certain

degree of discretion to approve or reject proposed transactions affecting competition in the UAE. Hence, for example, while the regulated sectors have been excluded from the scope of application of the Competition Law, investment in these sectors (including in relation to a foreign company operating through a branch in the UAE) will generally require a separate approval procedure to be undertaken with the relevant regulator, in particular, to update the undertaking's UAE licences and registration. Considerations in this context will not necessarily or exclusively be competition-related, and sector regulators and other government authorities retain considerable discretionary powers to reject a transaction where they have concerns, including national security or public policy.

4.7 Special Consideration for Joint Ventures

Joint ventures are not dealt with separately under the UAE Competition Legislation and are considered as any other transaction in terms of whether the undertaking is meeting the jurisdictional threshold and if there are any considerations as to whether it should be a restrictive agreement or if there is an abuse of a dominant position.

Therefore, other than the economic concentration aspects that will be evaluated, the Competition Department will also consider if the joint venture should be considered a restrictive agreement, or if it abuses a dominant position.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Once the decision is made by the Minister, the relevant competent authorities (including the Ministry) have the power and authority to enforce the decision. The authorities have the ability to prohibit or otherwise interfere with a transaction.

The clearance or rejection decision is made by the Minister, so it is worth highlighting the powers of the Minister that extend, amongst other responsibilities, to the following areas:

- commercial transactions;
- commercial agency;
- consumer protection;
- commercial companies, including publicly listed companies;
- financial and capital markets; and
- intellectual property.

Therefore, the Minister can significantly affect the provision of a product or a service in the UAE and can request the intervention of the UAE enforcement bodies to support any decision made in this regard.

On a relevant note, the Competition Law further provides that the Ministry shall co-ordinate with the competent authorities and the sectoral regulatory bodies for the execution of the provisions of the Competition Law. Furthermore, employees of the Competition Department determined by a resolution of the UAE Minister of Justice in agreement with the Minister and the concerned authority shall have the capacity of judicial officers to prove the violations of the provisions of the UAE Competition Legislation.

5.2 Parties' Ability to Negotiate Remedies

When the Competition Department have concerns about a transaction, the parties may propose remedies; for example, divestitures, or structural or behavioural remedies, and the Competition Department then has the sole discretion to reject or accept such remedies and include the same in its recommendations submitted to the Minister who will then consider such remedies and make a final decision.

5.3 Legal Standard

There is no specific legal standard that remedies must meet to be deemed acceptable, and it is up to the parties to agree with the Competition Department on the most suitable remedies, which then should be accepted by the Minister.

5.4 Negotiating Remedies With Authorities

Remedies can be proposed anytime until the Minister makes the final decision. It can be proposed by the relevant undertaking(s) making the notification, the Competition Department, or even the Minister, who can issue clearance of the economic concentration transaction subject to satisfying certain remedies. Proposals for remedies are usually communicated in writing but can also be initially discussed verbally for the purpose of submitting the final proposal of the remedy in writing.

5.5 Conditions and Timing for Divestitures

Divestiture (ie, the commitment to sell a business unit) may either take the form of:

- a horizontal division where the same shareholders own the shares of the new companies; or

- a vertical division where part of the existing company is carved out and transferred to a newly established subsidiary owned by the parent company.

It is most likely that the Competition Department will entrust the relevant undertaking(s) with preparing the divestiture plan (if acceptable to the Competition Department) and overseeing the implementation of the same post issuing the clearance. However, there is no general preference for any type of divestiture; it is assessed on a case-by-case basis.

Hence, there is no standard approach regarding conditions and timing for divestitures or other remedies. It will be left to the remedy arrangement agreed with the Competition Department or stipulated in the clearance issued by the Minister, including completing a transaction before remedies are complied with.

Failing to comply with the remedies may lead to withdrawing the clearance and/or imposing a fine, the value of which will be subject to the discretion of the Competition Department, and requires the approval of the Minister, while being limited to the thresholds stipulated by the Competition Law for fines imposed.

5.6 Issuance of Decisions

Decisions are issued formally, permitting or prohibiting a transaction, and notified to all concerned parties, bearing in mind that a decision would be implied if it is not made during the 90-day window provided in the Competition Law that may be extended for an additional 45 days.

Decisions are not available publicly and, therefore, cannot be revisited by the public to check such decisions. There is a privity to the parties made aware of such decisions which could be

limited only to the undertaking(s) or include third parties such as concerned UAE authorities and regulatory bodies or parties directly or indirectly affected by the decision.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The authors are not aware of the Competition Department requiring remedies or prohibiting foreign-to-foreign transactions since this is not publicly available information.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

According to the Competition Regulations, the Minister issues a reasoned decision in either of the following forms:

- a clearance decision to approve the transaction if it does not negatively affect competition or if it has positive economic impacts on competition that outweigh the negative impacts;
- a clearance decision to approve the transaction, provided that the relevant undertakings comply with the conditions and obligations specified by the Minister; or
- a decision to reject the transaction.

The decision should cover the transaction as a whole including any related arrangement (ancillary restraints) if it was part of the notification made to the Competition Department. No separate notifications would be required in addition to the decision.

The Minister may revoke the clearance if it appears that:

- the circumstances under which the approval has been granted no longer exist;
- the relevant undertaking(s) has/have breached any conditions or obligations on which the approval has been granted; or
- the approval has been granted on the basis of misleading or incorrect information – in that case, the Competent Authority shall take appropriate legal actions so as to sue and prosecute the relevant undertaking(s) in breach.

It should be noted that the Competition Department maintains a special record for recording decisions issued by the Minister regarding the notifications for approval of economic concentration transactions. This record is not publicly available.

It is important to highlight that these procedures might be amended in the new implementing regulations.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Refer to 3.9 Pre-notification Discussions With Authorities.

7.2 Contacting Third Parties

The Competition Department may contact third parties in any manner they deem appropriate, including telephone calls, emails, written letters to be sent by mail or electronically, or by way of interviewing such third parties (interviews are most likely to take place at the offices of the Competition Department).

The Competition Department may also request third parties that may be affected by the clearance of the transaction, to submit their comments in this regard within 15 days from the Competition Department's request (market test).

7.3 Confidentiality

The Competition Law requires the Ministry's employees to take steps to maintain the confidentiality of sensitive information which could cause serious damage if disclosed. In this regard, the Ministry's employees are not permitted to disclose any information reviewed as part of the notification application unless such disclosure is to the concerned parties or upon the request of the relevant authorities.

Violating the confidentiality duties could, under the Competition Law, lead to imposing a fine of no less than AED50,000 and no more than AED200,000.

Confidential documents submitted as part of the notification application should be labelled as "confidential" and non-confidential summaries should be provided.

7.4 Co-operation With Other Jurisdictions

There is no obligation for, or prohibition of, the Ministry to co-operate with other regulators in other jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Any concerned party can request the Minister to review a competition decision adopted by the Minister himself within 14 days from the date the applicant became aware of such decision.

The request should be in writing and explain the grounds on which the request is being made, with all the necessary supporting documents attached.

The Committee will, in return, review the request and submit its recommendation in this respect to the Minister within ten days from the date on which the application was referred.

The Minister should adopt a final decision within 30 days from the filing of the request. If a decision is not adopted within this timeframe, the request is deemed to be rejected.

Decisions issued by the Minister can be appealed before the competent court within 60 days from notification of the Minister's decision to the concerned parties.

It is important to note, however, that the Minister may enter into a settlement with undertakings deemed to have breached the Competition Law, except for breaches of unauthorised disclosure of the confidential information protected under the Competition Law.

Settlement with breaching undertakings is subject to the following:

- undertakings pay a fine amounting to no less than two times the minimum provided by the Competition Law; and
- the settlement is entered into before the filing of a criminal case.

The settlement is immediately effective post the payment of the fine by the relevant undertaking.

It is important to note that these durations and procedures might be amended after the issuance of the new implementing regulations.

8.2 Typical Timeline for Appeals

Refer to **8.1 Access to Appeal and Judicial Review** for the timelines.

On a separate note, appeals are not a public record so the firm is not aware of any successful appeals.

8.3 Ability of Third Parties to Appeal Clearance Decisions

See **8.1 Access to Appeal and Judicial Review**.

It should be further noted that the public records of the courts, up to the date of this guide, do not show any decisions appealing a clearance decision.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is no applicable information in this jurisdiction regarding legislation and filing requirements.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The Competition Law is a newly issued law that repealed the Law No 4 of 2012. The authors anticipate the implementing regulations to be issued shortly, as it has already been more than six months since the effective date.

10.2 Recent Enforcement Record

Competition enforcement records are not publicly available and there is no publicly available information about any enforcement records in terms of imposing fines, prohibiting transactions, or requiring remedies, particularly for foreign-to-foreign transactions.

10.3 Current Competition Concerns

The authors are unaware of any current competition concerns of the Ministry or the Competition Department. Thus, there are no notable trends in the UAE with regards to merger control review or enforcement.