Merger Control in Bahrain

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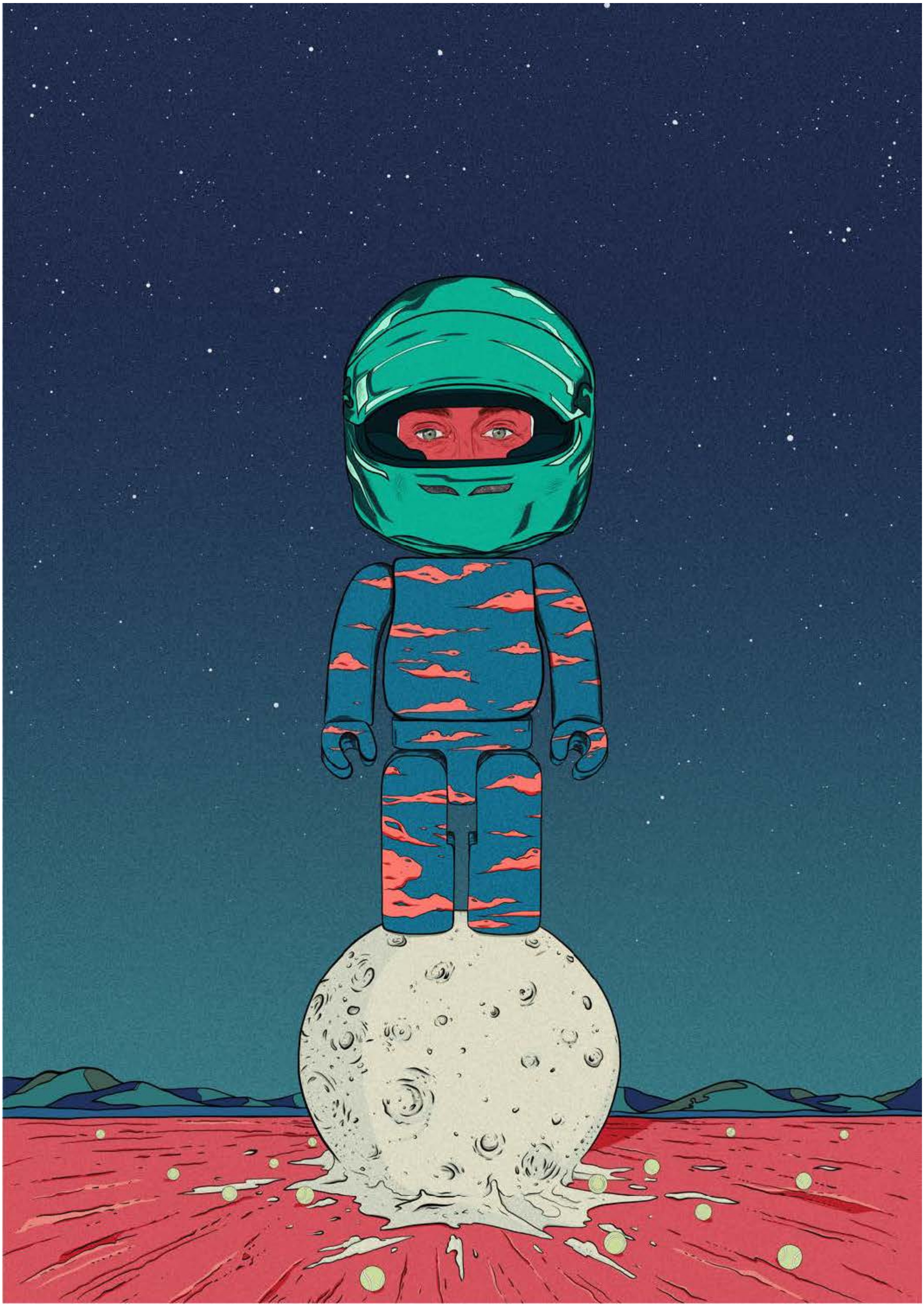

Illustration by [Deena Rashed]()

What merger control rules apply to mergers and acquisitions in Bahrain? What is the regulatory authority?

Regulatory framework

Law No. 31 of 2018 ("**Law on the Competition Promotion and Protection**") governs competition in Bahrain and restricts the creation of a market monopoly or price manipulation of products that is detrimental to other competitors. It provides the regulatory framework for the assessment of mergers, acquisitions and joint ventures (or 'economic concentrations') that meet the prescribed thresholds.

Regulatory authority

The Competition Promotion and Protection Authority ("**Authority**") which is yet to be established (and is envisaged to administer merger control in Bahrain by the Law on the Competition Promotion and Protection) has its powers currently vested in the Directorate for Consumer Protection in Bahrain.

What are the relevant jurisdictional triggering events/thresholds and the notification requirements?

Triggering events

The Law on the Competition Promotion and Protection applies to any "economic concentration" in Bahrain. An "economic concentration" arises if there is a change of control as a result of the following situations:

- The merger of two or more previously independent undertakings (in whole or in parts).
- The acquisition by one or more undertakings, providing direct or indirect control, over the whole or parts of one or more other undertakings.
- The creation of a joint venture.

The Authority is yet to publish its decision setting out the conditions and circumstances for what constitutes as change of control. Currently, there are no specific shareholding or other quantitative thresholds to measure whether a change of control has occurred. Any act that results in the merger or acquisition of assets, stocks, shares, uses, rights or obligations from one company to another one, that would enable a company or a group of companies to exercise control, directly or indirectly, over another company or group of companies would constitute an "economic concentration".

Thresholds

Whilst there is a general prohibition on economic concentration that result in the significant reduction of competition in the market, the Authority is yet to publish the criteria and thresholds for economic concentrations that will require prior approval in Bahrain.

Pending publication of the Authority's decision with respect to the above, businesses contemplating a merger or acquisition that would result in a significant reduction of competition within the context of their relevant markets are recommended to notify the Authority and seek confirmation on whether or not an approval is required.

The Law on the Competition Promotion and Protection also defines circumstances when a company (or a group of companies) has a ‘dominant position’ in its relevant market. A single entity with a market share that is greater than 40%, or a group of entities with a market share greater than 60%, are considered to be in ‘dominant position’ in their relevant markets. The law prohibits an abuse of such dominant position but does not prohibit an entity (or a group of entities) from having a dominant position. Whilst the above-mentioned thresholds for a market dominant position are not determinative of whether or not an economic concentration requires the Authority’s approval, they can serve as guidance for businesses in deciding whether to notify and seek the Authority’s no objection for a contemplated merger or acquisition. Where businesses expect an economic concentration to result in an entity (or a group of entities) to have a dominant position in its relevant market, they may approach the Authority and seek its view on whether an approval is required. Note that an entity (or a group of entities) may, at the Authority’s discretion be classified as having a dominant position even its market share does not exceed the above-mentioned percentages. In any case, the acquiring entity or the merging entities must assess whether the proposed merger or acquisition is likely to result in reduced competition based on the proposed market share to be acquired (in the context of the overall market share as distributed amongst the current players in the market).

Notification requirements and procedures

The procedures and fees for the application process are yet to be issued by the Authority. The notification and where required, the application for the Authority’s approval must be submitted by a representative of the relevant company. For acquisitions of sole control, the undertaking acquiring control will be expected to submit the notification. The notification may be submitted jointly by the merging parties or by the companies acquiring joint control in the case of a merger, an acquisition of joint control, or the creation of a joint venture.

Currently, there is no specified deadline for when a notification must be submitted. However, as notifiable transactions cannot be implemented before obtaining clearance from the Authority, parties must submit the notification (or approach the Authority to confirm whether or not an approval is required) far in advance of their intended closing date to allow sufficient time for the Authority’s review.

The Authority shall accept or reject an application for the approval on the economic concentration within 90 days from the date of submitting such application. Where an economic concentration is approved, the Authority may impose, at its discretion, conditions or restrictions to be followed by the post-merger or acquisition entity (or entities).

Pre notification and formal/informal guidance

Although there is no legal obligation to engage in any pre-notification consultations with the Authority, it is recommended practice to do so and is helpful in the review process pending publication of the relevant criteria and procedures. Prior consultations have several advantages for both the Authority and the parties. For example, the parties can discuss whether or not an approval is required and the information requirements of the notification.

What, if any, arguments can be used to counter competition issues?

The Authority is entitled to reject an application for the approval of the transaction if it finds that the transaction will significantly reduce the competition in the market or if the parties fail to provide sufficient (or provide incorrect, false or fraudulent) data, information or documents on time.

The concerned Minister (of Bahrain’s Ministry of Industry, Commerce and Tourism) may, based on the opinion of the Authority and the approval of the Cabinet of Ministers approve a transaction (that is deemed generally prohibited) for ‘exceptional considerations’ in ‘public interest’, with conditions (if necessary).

The Law on the Competition Promotion and Protection is relatively new having been enacted in 2018. As a result, there is currently a lack of prescriptive guidance as to the evidence of efficiencies that parties can demonstrate to satisfy the criteria of ‘exceptional considerations’ in ‘public interest’. Based on industry norms and global best practices, we would expect the Authority to take into consideration the following (non-exhaustive) factors:

- Benefit to the consumers in Bahrain.
- If the proposed concentration is to enable the performance of any government contracts, of strategic importance to Bahrain.
- Considerable long term job opportunities will be created in Bahrain.
- Technology transfer.
- Any merger-specific factors, that are directly caused by the transaction itself and not achievable by less anticompetitive means.

Even where parties are able to demonstrate the likelihood of efficiencies resulting from a transaction, it is generally expected that the benefits from the efficiencies are capable of sufficiently ameliorating the harm to competition caused by the merger.

Pending the publication of the executive orders setting out the relevant criteria and procedures, we expect the Authority to review transactions on a case by case basis.

For further information, please contact Foutoun Hajjar or Siddharth Goud.