

# A Brief on the New Saudi Competition Law and its Implementing Regulations

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## Background

The new Competition Law (the "**Competition Law**") of the Kingdom of Saudi Arabia (the "**Kingdom**") was enacted by Royal Decree M/75 on 29/06/1440 Hijri (corresponding to 6 March 2019) and came into force on 24/01/1441 Hijri (corresponding to 23 September 2019). The Implementing Regulations of the Competition Law (the "**Implementing Regulations**") were issued by the Board of Directors (the "**GAC Board**") of the General Authority for Competition ("**GAC**") and came into force on 25/01/1441 Hijri (corresponding to 24 September 2019). The Competition Law replaced the previous Competition Law enacted by Royal Decree M/25 dated 4/05/1425 Hijri (corresponding to 22 June 2004).

This article provides a brief overview of some of the key provisions of the Competition Law and the Implementing Regulations.

## Jurisdiction and Scope

The Competition Law and the Implementing Regulations apply<sup>1</sup> to:

- all entities within the Kingdom, including:
  - establishments and companies engaged in an economic activity in the Kingdom, whatever their legal forms, nationalities, sizes, and ownership; whether their license to practice the activity is still valid or otherwise; and whether they practice the licensed activity or a different one;
  - an individual engaged in an economic activity whether or not he has obtained a license to practice his activity;
  - all forms of entities and groupings when engaged in economic activities; and
  - e-platforms, whether or not they are licensed to practice their activity; and

<sup>1</sup> Article 3(1) of the Competition Law and Article 3 of the Implementing Regulations.

- practices occurring outside the Kingdom that have an adverse effect on fair competition within the Kingdom.

The Competition Law and the Implementing Regulations will not apply<sup>2</sup> to a public establishment or state-owned company if it is solely authorized by the Saudi Government to provide goods or services in a particular field. Such exemption must be granted by a royal decree or a resolution of the Council of Ministers authorizing the relevant public establishment or state-owned company to be the sole provider of goods or services in a particular field.<sup>3</sup> However, the provisions of the Competition Law and the Implementing Regulations apply to a state-owned company in fields other than the one in which it is solely authorized by the Saudi Government to provide goods or services.

### GAC, GAC Board and GAC Committee

GAC is the regulatory body in charge of implementation and enforcement of the Competition Law and the Implementing Regulations. GAC has primary jurisdiction over any matters arising from the application of the Competition Law and the Implementing Regulations even in cases of conflict or overlap with the jurisdiction of other governmental bodies.<sup>4</sup> The Statute of GAC was approved by Resolution of the Council of Ministers number 55 dated 20/01/1439H (corresponding to 10 October 2017).

The GAC Board is authorized to amend, repeal or interpret the Implementing Regulations or issue guidance and rules supplementary to them.<sup>5</sup>

The adjudication of violations of the Competition Law and the Implementing Regulations is assigned to the Committee for Adjudication of Competition Law Violations (the "**GAC Committee**").

### Anti-Competitive Practices

Article 5 of the Competition Law prohibits practices (including contracts, whether written or oral, explicit or implicit) if their purpose or effect prejudices competition. Article 8(1) of the Implementing Regulations sets out an expanded definition of anti-competitive practices – all forms of behaviors and practices contrary to Article 5 of the Competition Law, including agreements, contracts, arrangements, or understandings between entities shall be prohibited, whether written or oral, explicit or implicit, if their purpose or effect undermines competition.

<sup>2</sup> Article 3(2) of the Competition Law and Article 4(1) of the Implementing Regulations.

<sup>3</sup> Such public establishments and state-owned entities are also exempt from reporting economic concentration transactions to GAC (Article 4(3) of the Implementing Regulations).

<sup>4</sup> Article 3(3) of the Competition Law and Article 5(2) of the Implementing Regulations.

<sup>5</sup> Article 89 of the Implementing Regulations.

Article 5 of the Competition Law contains a non-exhaustive list of anti-competitive practices:

- price fixing;
- limiting the free flow of goods and services to and from the market;
- denying access to the market;
- dividing markets;
- freezing or limiting manufacturing, development, distribution, marketing and other investment activities; and
- bid rigging.

Article 8(2) of the Implementing Regulations provides that practices among competing or potentially competing entities (i.e. horizontal relationships) are deemed anti-competitive if such practices involve, for example, price fixing or dividing markets (e.g. geographically, or based on distribution centers, customer types and seasons/time periods).

The wide scope of the restriction in Article 5 of the Competition Law, which appears not to differentiate between vertical and horizontal relationships, will likely impact restrictive covenants (e.g. non-competition and non-solicitation) typically found in joint venture, distribution and resale agreements.

### Abuse of Dominant Position

Article 6 of the Competition Law prohibits any entity having a dominant position in the market or an important part thereof from exploiting such position to undermine or limit competition. An entity or a group of entities is deemed to have a dominant position if they meet either or both of the following tests:<sup>6</sup>

- having a market share of 40% or more of the relevant market; and/or
- having an ability to influence the relevant market such as controlling prices, production or demand.

Article 6 of the Competition Law sets out a non-exhaustive list of practices in which entities having a dominant position are prohibited from engaging:

- selling goods or services at a price lower than the total cost in order to remove other entities from the market or expose them to serious losses or impede the entry of potential entities;
- determining the prices or conditions for the resale of goods or services or imposition thereof;

<sup>6</sup> Article 10 of the Implementing Regulations.

- reducing or increasing the available quantities of products to control prices and create false abundance or deficit;
- discriminating in the treatment of entities with similar contracts in relation to the prices of goods and service fees or the conditions of sale and purchase;
- refusing to deal with another entity without an objective reason, in order to restrict its entry into the market;
- requiring an entity to refrain from dealing with another entity;<sup>7</sup> and
- making the sale of goods or the provision of services conditional upon bearing of obligations or acceptance of goods or services which by their nature or by commercial use are not related to the goods or services subject to the original contract or transaction.

### Economic Concentration (Merger Control)

The Competition Law uses a concept of economic concentration to deal with merger control. Economic concentration is defined as any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of a firm to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or any other form that leads to the control of a firm(s), including influencing its decision, the organization of its administrative structure, or its voting system.<sup>8</sup> This definition captures asset and share purchases, joint ventures, mergers and takeovers.

Article 7 of the Competition Law provides that entities seeking to participate in an economic concentration transaction must inform GAC at least 90 days before completion if the total annual sales value of the entities seeking to participate in the economic concentration exceeds the amount determined by the Implementing Regulations. The requirement to report economic concentration transactions to GAC is based on a turnover test set out in Article 12 of the Implementing Regulations. This test requires a notification to be made to GAC if the total annual sales value of all entities intending to participate in the economic concentration exceeds SAR 100 million (c. \$26.6 million).

The 90-day review period starts from the date on which the applicant is notified by GAC that it has received all required documents and

<sup>7</sup> This prohibition targets exclusivity and non-compete undertakings granted in favor of dominant entities.

<sup>8</sup> Article 1 of the Implementation Regulations.

information in respect of the application and payment of the prescribed fee.<sup>9</sup> Such review period may also be extended by GAC if additional information or documents are requested from the parties, until such information or documents are provided.<sup>10</sup>

The GAC Board has set the application fee at 0.0002% of the aggregate value of the turnover of all parties participating in the transaction which is the subject of the economic concentration application.<sup>11</sup> The total amount of the application fee is capped at SAR 400,000 (c. \$106,000).

Parties may approach GAC for pre-screening discussions before formally reporting the transaction to GAC.<sup>12</sup>

Article 23 of the Implementing Regulation requires GAC to issue and notify its decision (approval, conditional approval or refusal) to the applicant before the expiry of the 90-day review period. GAC may announce its decision to the public.<sup>13</sup>

GAC has discretion to examine an economic concentration transaction (whether before or after its completion) even if the parties have failed to report the same to GAC.<sup>14</sup> If the parties have completed the economic concentration transaction after reporting it to GAC but before the issuance of a GAC decision regarding it or the lapse of the 90-day review period, the GAC Board may require the parties to restore their previous (pre-completion) status and terminate the economic concentration transaction within a specified period. In such a case, the parties will be liable for any damages arising from the completion of the economic concentration.

Going forward, the economic concentration provisions of the Competition Law and the Implementing Regulations will have a major impact on public and private M&A and joint venture transactions in the Kingdom given the low turnover threshold (SAR 100 million) which triggers the reporting obligation. Obtaining GAC approval for such transactions needs to be a condition precedent to their completion. In the context of a public M&A transaction, the reporting of the transaction to GAC should be made after the announcement of the transaction, given GAC may announce its decision to the public.

### Exemptions

Under Article 8 of the Competition Law, the GAC Board may, upon request, exempt an entity from the application of Articles 5 (anti-competitive

<sup>9</sup> Article 14 of the Implementing Regulations.

<sup>10</sup> Article 15(2) of the Implementing Regulations.

<sup>11</sup> [https://gac.gov.sa/PageNews\\_en.aspx?id=2323](https://gac.gov.sa/PageNews_en.aspx?id=2323)

<sup>12</sup> Article 18 of the Implementing Regulations.

<sup>13</sup> Article 24 of the Implementing Regulations. GAC normally publishes its decisions on its website ([www.gac.gov.sa](http://www.gac.gov.sa)).

<sup>14</sup> Article 17 of the Implementing Regulations.

practices), 6 (abuse of dominant position) and 7 (economic concentration) of the Competition Law if such exemption would lead to improved market performance, or improve the performance of entities in terms of the quality of the product or technological development or creative efficiency or both. Such decision would be reached upon a recommendation by a technical committee formed for this purpose.

### Enforcement Powers

The Competition Law and the Implementing Regulations have granted GAC Board and GAC enforcement officers and investigators wide-ranging enforcement powers (e.g. searching premises, accessing books and records, issuing summons, instigating criminal proceedings).

### Penalties

The Competition Law provides for the following penalties (which are in addition to any other applicable penalties under other laws and regulations of the Kingdom):

- The violation of any of the provisions of Articles 5 (anti-competitive practices), 6 (abuse of dominant position), 7 (economic concentration) and 11 (completion of economic concentration before GAC approval or the expiry of the 90-day review period without GAC notifying its approval or refusal) of the Competition Law is punishable by a fine not exceeding 10% of the total annual sales value of the subject of the violation. When it is impossible to estimate the annual sales, the fine will not exceed SAR 10 million (c. \$2.6 million). The GAC Committee may, at its discretion, impose a fine not exceeding three times the gains made by the violator as a result of the violation.<sup>15</sup>
- The violation of any provision of Article 16<sup>16</sup> of the Competition Law is punishable by a fine not exceeding 5% of the annual sales value of the subject of the violation. When it is impossible to estimate the annual sales, the fine will not exceed SAR 5 million (c. \$1.3 million).<sup>17</sup>

<sup>15</sup> Article 19(1) of the Competition Law.

<sup>16</sup> Article 16(1) states: *An entity may not prevent the law enforcement officer or investigator from performing a task assigned to him in accordance with the powers conferred upon him by the Law, nor withhold information from him, provide misleading information, or conceal or destroy documents that benefit the investigation.*

<sup>17</sup> Article 19(2) of the Competition Law.

- The violation of any other provision of the Competition Law or the Implementing Regulations is punishable by a fine not exceeding SAR 2 million (c. \$533,000).<sup>18</sup>

Any of the fines imposed above may also be doubled if the violator repeats the same violation within three years from the date of resolution of the first violation.<sup>19</sup>

The GAC Board may also take one or more of the following measures:<sup>20</sup>

- Require the violator to dispose of certain assets, shares, or property rights, or to perform any other act to ensure the removal of the violation.
- Require the violator to pay a daily fine not exceeding SAR 10,000 (c. \$2,600) until the violation is removed within the period specified by the GAC Board. If such period elapses without removing the violation, the fine will be doubled until it is removed.
- If the violation continues, the entity will be temporarily closed for a period not exceeding 30 days as of the expiry of 90 days from the GAC Board's notification to the entity stating removal of the violation.

<sup>18</sup> Article 20 of the Competition Law.

<sup>19</sup> Article 19(3) of the Competition Law.

<sup>20</sup> Article 21(2) of the Competition Law.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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