



Spotlight on Saudi Arabia: Updates in Competition Law and Merger Control

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The Kingdom of Saudi Arabia recently announced that it has amended its merger-control thresholds to operate a revenue-based test in place of the current market-share test. This amendment comes alongside a revision of other material provisions of the competition regime and focuses on protecting and encouraging fair competition to support the market environment and economic development in the Kingdom. The changes were published in the Official Gazette on 20/07/1440 H (corresponding to 27 March 2019) and are expected to become effective 180 days from publication, i.e., on or around 19 September 2019.

The new Saudi competition law was issued by Royal Decree No. (M/75) dated 29/06/1440 H (corresponding to 06 March 2019) (the "**New Law**"), and replaces the regime implemented under Royal Decree No. (M/25) dated 04/05/1424 H (corresponding to 22 June 2004) (the "**Old Law**"). Like its predecessor, the New Law deals with many aspects of competition regulation in the Kingdom, including restrictive agreements, abuse of market dominance, and merger control.

SOME KEY ASPECTS OF THE NEW LAW INCLUDE:

1. REFORM OF EXEMPTION FROM COMPETITION REGIME

The New Law confirms that anti-competitive agreements in certain cases may be exempted from investigation and prosecution if they give rise to consumer benefits in terms of technical development or innovation. The New Law also replaces the comprehensive, unconditional exemption from the competition regime for governmental organizations and wholly-owned state companies with a conditional exemption for governmental organizations and wholly-owned state companies where they have an exclusive authorization from the Saudi Arabian government to provide commodities or services in a specific sector.

2. REDUCTION IN AMBIT OF PRICE-REGULATED MARKETS

The New Law expressly states that the prices of products and services shall be determined, controlled by and in accordance with those of a competitive market, except for products and services that are subject to a decision of the Council of Ministers or other legislation. This is particularly important in regulated markets. As such, the New Law seeks, in part, to eliminate regulatory intervention in markets for products and services that are currently regulated in the Kingdom. The New Law indicates that regulators in the Kingdom no longer will be allowed to set prices in the relevant markets without appropriate legislation or a decision issued by the Council of Ministers.

3. REFORM OF SANCTIONS REGIME

The New Law also updates the Kingdom's position on applicable sanctions and stipulates fines for individual violations (including non-notification of reportable mergers) up to the greater of:

- (i) ten per cent (10%) of the value of total annual sales; or
- (ii) if it is not possible to arrive at an estimate of the total annual sales, ten million Saudi Riyals (SAR 10,000,000).

The General Authority for Competition ("**GAC**"), as regulator of the competition regime in the Kingdom, in the alternative may impose a fine not exceeding three (3) times the gains realized by the violator. In addition, the New Law continues to support the concept of recovery of damages by injured parties as a result of violations. Repeat violations committed within three (3) years of the date of determination of the first violation may be subject to a fine that is up to two (2) times the value of the first fine imposed.

4. REFORMULATION OF 'ECONOMIC CONCENTRATION'

An 'economic concentration' is defined by the New Law as arising from "*any act resulting in a full or partial transfer of the ownership of assets or rights or shares or commitments of one entity to another, or the amalgamation of two departments/administrations or more in one combined department/administration in accordance with the implementing regulations of the law*". Historically, mergers and acquisitions were included in the definition of 'economic concentration' as it appeared in the Implementing Regulations of the Old Law. The New Law now defines the 'economic concentration' as mentioned above, but reportedly will provide further elaboration on this concept in the implementing regulations of the New Law. Those are not yet published, but it is expected that the GAC will publish them before the New Law becomes effective in mid-September 2019.

The New Law departs from the Old Law in that it introduces revenue thresholds that will trigger the requirement to provide the GAC with prior notice of an intended merger or acquisition. The New Law therefore fully supplants the tests in the Old Law based on market share with respect to mergers and acquisitions. Previously, entities achieving a market share equivalent to forty *per cent* (40%) or more were under an obligation to notify the GAC of a planned merger or acquisition at least sixty (60) days prior to the completion of the planned transaction. As the GAC has acknowledged, the old tests based on market share were difficult to apply in practice, leading to a perceived lack of merger notifications by reference to estimated levels of merger activity in the market. Under the New Law, the old tests are now replaced with a revenue threshold which is expected to be designated in the implementing regulations of the New Law, and the notification requirement has been extended to at least ninety (90) days prior to the completion of the planned transaction.

5. NEW THRESHOLDS FOR TRIGGERS AWAITED

In addition to a concept of 'economic concentration', both the Old Law and the New Law contain the concept of a 'dominant position'. The latter is defined as "*a situation where a firm or group of firms are in control of a specific percentage of the market in which it carries out its activities or is able to influence such a market or both*".

At this time, both the precise revenue threshold constituting an 'economic concentration' and the precise market-share threshold constituting a 'dominant position' under the New Law are not yet specified. These thresholds, as well as other explanatory articles, are expected to be included in the implementing regulations of the New Law. It remains to be seen whether the implementing regulations of the New Law will also provide guidance on factors relevant to the calculation of turnover, including the affected undertakings for the purposes of relevant turnover.

As with previous changes to the competition regime in the Kingdom, a transitional regime between now and mid-September is unlikely. As such, the introduction of the New Law is an important development to take into consideration for current and planned transactions involving Saudi Arabian entities or if the transacting parties conduct business in the Kingdom. For example, the New Law may impact the risk-allocation in share purchase agreements and other transaction documents, as well as the timing of transactions, primarily due to the requirement to notify the GAC at least ninety (90) days in advance of a subject transaction.

More generally, the New Law signals efforts to increase competition enforcement and merger control in the Kingdom, both domestically and in response to elevated levels of foreign direct investment into the Kingdom. This is already apparent in various fields, particularly in the fast-moving pharmaceutical and consumer goods sectors where the GAC in recent years has stepped up its level of vigilance and enforcement noticeably as evidenced by its most recent annual report for the year 1438/1439 H (corresponding to 2017). This report highlighted the GAC's activities in 2017 as including: 41 applications for approval of economic concentrations, 69 complaints, 800 hours spent on field visits, 135 judicial proceedings in competition cases, and 14 judgments against entities violating the Old Law. More recently, on 02 February 2019, the GAC announced that it was initiating criminal actions against a number of entities in the pharmaceutical sector for alleged violation of the competition regime.

With the New Law the GAC as a member of the International Competition Network has now taken a significant step toward further alignment of the Kingdom with the competition regimes of other, longer-established agencies in other jurisdictions. Nonetheless, in terms of understanding the New Law and its effects on the market, there is still some way to go, both in terms of substantive analysis and the implementation of due-process principles.

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Contacts:



**Mohammed bin
Saud Al-Rasheed**

Partner
T: +966.11.218.7890
mohammed.al-rasheed
@bakerbotts.com



Shadi Haroon

Partner
T: +966.11.218.7825
shadi.haroon@bakerbotts.com



John Vincent Lonsberg

Partner
T: +971.4.436.3680
john.lonsberg@bakerbotts.com



Paul Lugard

Partner
T: +32.2.891.7320
paul.lugard@bakerbotts.com



Stephen Matthews

Partner
T: +971.4.436.3630
stephen.matthews@bakerbotts.com



Euan Pinkerton

Partner
T: +966.11.218.7820
euan.pinkerton@bakerbotts.com



Abdulaziz Abdullah Al-Alami

Associate
T: +966.11.218.7805
abdulaziz.alalami@bakerbotts.com



Abdulrahman Aflah

Associate
T: +966.11.218.7895
abdulrahman.aflah@bakerbotts.com



Dina Jubrail

Associate
T: +32.2.891.7351
dina.jubrail@bakerbotts.com