

## The new competition law in Saudi Arabia

A new competition law has been issued in Saudi Arabia which introduces some fundamental changes to the existing competition law regime, including in relation to the applicable merger control procedures.

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### Overview

On 06 March 2019, a new law was issued in the Kingdom of Saudi Arabia (**KSA**) by Royal Decree No. M/75 of 1440H (the **New Law**) effectively to replace the Royal Decree No. M/25 of 1425H (the **Old Law**) regarding competition law in the country. The New Law will take effect from approximately 19 September 2019 (that is, 180 days following publication in the Official Gazette) and will be further clarified in due course when the implementing regulations are published.

### Summary

We summarise some of the key changes below:

- The aim of the New Law, in addition to protecting and encouraging fair competition and combating anti-competitive practices, newly refers to protecting consumer interest. More generally, the aim is stated as improving the KSA market and the development of the economy (Article 2).
- The scope of application of the New Law also clarifies the scope of the competition law regime (Article 3), notably:
  - in addition to applying to establishments in KSA, the New Law will also apply to practices occurring outside of KSA which have an effect within KSA (which is in line with the approach of other competition law regimes around the world)
  - additionally, under the Old Law, wholly owned public institutions and companies were excluded from its provisions. Under the New Law, public / state-owned enterprises are only excluded from the provisions of the New Law if authorized, solely by the government to provide products or services in a certain field, thereby narrowing the scope of the exemption, and

- the General Authority for Competition (the **Authority**) will have inherent jurisdiction with regard to overlapping or conflicting competencies of other governmental bodies which may arise when the New Law is applied.
- The New Law specifies that prices for goods and services shall be determined according to the principles of a competitive market, unless there is a specific decision by the Council of Ministers or under KSA law. The implication of this provision is that sectoral regulators will have reduced scope to set prices within their markets without a specific decision or legislation and it may, therefore, reduce the autonomy of the sector regulators to set prices (Article 4).
- The types of conduct which shall be prohibited under the new law have been clarified (pursuant to Article 6).
- The New Law recognises that certain practices or agreements which may be anti-competitive, may nonetheless be permitted if they improve market performance or generate efficiencies in quality, technology or creativity (subject to assessment by a “technical committee”). This feature of the New Law (which expands upon and clarifies a similar provision in the Old Law) is set out in a new standalone Article (8).
- With regard to merger control procedures, as a significant change to the Old Law, the applicable test to determine whether an ‘Economic Concentration’ will need to be notified to the Authority will change from a “market share threshold” test to “turnover” test under the New Law. We understand that the basis for this change is to increase the number of merger control notifications (as a “market share threshold” test is arguably harder to apply, which has potentially led to a decreased number of merger notifications in the past). Under the New Law, qualifying Economic Concentrations must now be notified 90 days prior to completion (increased from 60 days under the Old Law).
- There is a new prohibition in relation to preventing or hindering the conduct of an investigation under the provisions of the New Law (Article 16).
- The New Law develops the existing sanctions regime:
  - it retains the sanctions of a fine not exceeding 10% of total annual sales of turnover, or not exceeding 10 million Riyals for offences under the New Law in relation to anti-competitive agreements, abuse of dominance or merger control. However, in addition, at the discretion of the Authority, an establishment may be fined three times the gains earned as a result of a breach of the New Law
  - it imposes fines of 5% of total annual sales turnover, or not exceeding five million Riyals, for violations of the new Article 16 (which relates to obstructing an investigation)
  - it retains the provision doubling the applicable sanctions in the case of recidivism; recidivism is defined under the New Law as repeating the offence within three years of the previous decision being published; and
    - it confirms that a violation decision shall be published at the violators expense, once a decision has become finalised.
- In addition, under the New Law, the Board of the Authority has increased powers temporarily to close down an establishment which fails to remedy a competition law breach identified by the Authority (Article 21).
- The New Law also makes provision for immunity from the provisions of the New Law (or scope for settlement) in the event an infringing establishment provides evidence of its co-infringers. Again the scope of this Article will be clarified under the implementing regulations (Article 23).

## Comment

The changes brought in by the New Law represent a welcome development to the existing KSA competition law regime

and more closely aligns KSA with international standards. We note, however, that further implementing regulations, to be published in due course, will clarify its application.

In addition, the implications of the New Law remain to be seen in practice. By way of example, we note that Article 3 of the New Law appears to give the Authority jurisdiction to determine conflicts with other regulators within KSA which share competition law competencies. In this regard, pursuant to the Executive Regulations of the Audiovisual Media Law (which we understand will enter force soon) the General Commission for Audiovisual Media (**GCAM**) - which is the government organization responsible for the development, regulation, and supervision of audio-visual media transmission and content within KSA - will receive competition law powers (although GCAM's powers in the Executive Regulations refer to the Old Law). Pursuant to the provisions of the New Law, we understand that the competition law powers of the Authority will take precedence over those of GCAM, but there is the potential for some uncertainty for establishments operating in this sector regarding how the New Law will be applied and how interventionist the Authority will be.

Furthermore, the fundamental changes to the merger control regime are likely to lead to an increase in the number of merger control filings in KSA. The efficacy of the new merger control regime at processing merger control filings could have an impact on the level of merger activity in KSA and the wider region and/or factor into the merger control filing strategy of merger parties and their advisors.

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