

Client Alert

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In This Issue:

Jurisdiction and Scope
Market Prices
Anti-Competitive Practices
Unilateral Behavior /
Dominance
Merger Control
Exemptions
Investigations and Dawn
Raids
Fines
Leniency
Committee for the Resolution
of Violations of the Law

Saudi Arabia reforms its Competition Law - What is new?

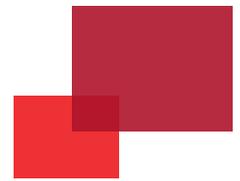
Saudi Arabia

On 25/1/1441H (corresponding to 24 September 2019), the Board of Directors of the General Authority for Competition (the "**Authority**") issued the anticipated implementing regulations (the "**New Implementing Regulation**") to the new Competition Law issued by Royal Decree no. M/75 dated 29/6/1440H (corresponding to 6 March 2019 (the "**New Law**"). The New Law and the New Implementing Regulations became effective on 25/1/1441H (corresponding to 24 September 2019). The New Law and New Implementing Regulations introduced a number of incremental reforms to the former Competition Law adopted by Royal Decree No. (M/25) dated 4/5/1425H (corresponding to 22 June 2004) as amended by the Royal Decree no. M/24 dated 11/4/1435H (corresponding to 12 February 2014) (the "**Previous Law**") and its Implementing Regulations (the "**Previous Implementing Regulations**").

The most significant changes introduced include the following:

Jurisdiction and Scope

- The New Law explicitly provides that it applies to entities operating in Saudi Arabia (whether or not validly licensed) but also to practices taking place abroad, if such practices produce anti-competitive effects in Saudi Arabia.
- The concept of entities subject to the New Law under the New Implementing Regulations is very broad and encompasses any institutions, companies or groups engaged in an economic activity regardless of their legal form, nationality and ownership. The concept of "economic activities" is defined broadly to include any commercial, agriculture, industrial service and professional activity.
- The New Implementing Regulations also include in the concept of entities subject to the New Law individuals engaged in economic activities (which suggests that individual end-customers may not be exempt from the scope of application of the New Law) and electronic platforms and applications (despite their absence of legal personality so presumably the New Law and the New Implementing Regulations will simply apply to the entities owning and/or operating such websites or digital applications)
- With respect to practices taking place outside Saudi Arabia, the New Implementing Regulations vest the Authority with the power to (i) review behaviors and practices having a potential or existing impact on competition in Saudi Arabia; and (ii) take the necessary measures and procedures, or request the foreign competent authorities to take or implement the same.



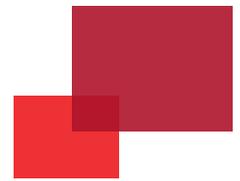
- While the Previous Law provided for a broad exemption to public corporations and state-owned entities, the New Law and New Implementing Regulations limit such exemption to public institutions and to wholly state-owned companies solely authorized under a Royal Order, a Royal Decree, a Council of Ministers resolution, or a High Order to provide commodities or services in any given specific field of activity. In this case, the exemption is only granted to such public institutions or wholly state-owned companies with respect to the field of activity for which it has exclusivity.
- The New Law and the New Implementing Regulation apply to entities participating with exempted owned-state companies in activities violating the New Law.
- The New Implementing Regulations also include a supremacy clause giving the Authority jurisdiction to apply the New Law and the New Implementing Regulations to entities operating in a field of activity that is regulated by another governmental body (e.g. pharmaceutical and information technology sectors). The New Implementing Regulations vest the Authority with inherent jurisdiction in case of conflict or overlap of competences with those of other governmental bodies arising from the implementation of the provisions of the New Law.

Market Prices

- Article 4 of the New Law sets as a general rule that the prices of commodities and services must be determined in accordance with market rules and the principles of free competition. The New Implementing Regulations reinforce this rule of free market by stating that entities in Saudi shall be free to price commodities and services in accordance with market rules, free competition principles, and supply and demand factor. However, these provisions exclude situations where prices are regulated by the State (i.e. if they are determined by virtue of a Council of Ministers' resolution or by virtue of regulations to that effect). The New Implementing Regulations also clarify that entities may not conclude agreements, or abuse their dominant position, in violation of New Law and the Implementing Regulations even where prices are set by a Council of Ministers resolution or other laws.

Anti-Competitive Practices

- Article 5 of the New Law and Article 8 of the New Implementing Regulations prohibit anti-competitive practices and agreements, which have as their object or effect the restriction of competition. Article 5 of the New Law includes an illustrative list of eight anti-competitive practices and agreements including price fixing, restricting freedom of flow of commodities and services to the market, preventing any entity

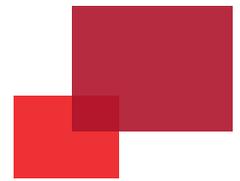


from exercising its right to enter or move out of the market, division or allocation of the markets and bid rigging. The New Law introduces new restrictive practices, such as price recommendation and fixing the size, weight or quantities for the production of commodities or the performance of services.

- The New Law no longer requires that such anti-competitive practices or arrangements take place between actual or potential competitors but instead provides that all practices, including agreements or contracts "among entities", are prohibited if their objective or impact constitutes a violation of competition. The New Law does not distinguish between horizontal and vertical relationships. Hence, presumably all practices that are considered restrictive under the New Law will be prohibited regardless whether the relevant parties are actual competitors, potential competitors or engaged in a vertical relationship.
- Article 8 of the New Implementing Regulations provides that the following anti-competitive behaviors are deemed to be *per se* violations: (i) raising, lowering or fixing the prices of commodities, terms of sale and purchase and the like, (ii) depriving, wholly or partially, an entity or a group of entities from commodities available in the market, (iii) dividing markets for discrimination in the sale or purchase of commodities, or allocating the same based on any criteria including geography, distribution centers, types of clients and seasons or periods of time, and (iv) complicity or collusion in tenders or bids in government and non-government auctions, tenders and procurement, in any form whatsoever. Interestingly, Article 8 of the New Implementing Regulations (unlike for Article 5 of the New Law) limits *per se* violations to anti-competitive practices taking place among "competing or potentially competing entities". Hence, presumably, none of the restrictive practices set out in Article 5 of the New Law shall be deemed a *per se* violation if they occur in the context of a vertical relationship.

Unilateral Behavior / Dominance

- The New Law provides a general definition of dominance as a situation where an entity or a group of entities is controlling and/or is able to influence a certain percentage of the market in which it exercises its activity. The New Implementing Regulations are more specific and define dominance by reference to the two following alternative criteria: (i) a market share in the relevant market amounting to 40% or more or (ii) the ability to influence the Relevant Market, including controlling prices, production or offering. Both criteria must be assessed either individually or in the context of a group of companies acting in concert. The New Law and the New Implementing Regulations do not set a timeline to establish dominance (whereas the Previous Law required that its criteria

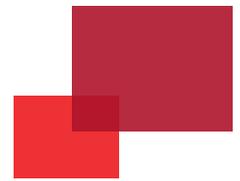


for dominance should be met for at least a period of 12 months).

- Under Article 6 of the New Law, dominant entities are prohibited from abusing their dominant position to violate, limit or prevent competition. This Article includes a list of seven prohibited practices for dominant entities which may not -for example- sell below cost to force competitors out of the market or expose them to substantial losses or to prevent the entry of a new entity on the market, or refuse to deal with other companies without a valid justification. Dominant entities may also not compel an entity to refrain from dealing with another entity (a new restrictive practice expressly introduced by the New Law) and which applies to exclusivity and non-compete obligations introduced by dominant entities.
- Article 10 of the New Implementing Regulations provides that the following two practices are to be considered as per se violations for dominant entities: (i) restricting an entity from dealing with another entity (which amounts to imposing an exclusivity obligation) and (ii) making a sale of a commodity conditional upon assuming an obligation, or accepting a commodity, which by nature, or according to commercial use, is not related to the initial commodity subject of the contract or deal (which amounts to bundling).

Merger Control

- Under the New Law, any entity intending to participate in an economic concentration must notify the Authority prior to completing the transaction where the total annual value of sales of the participating entities exceeds one hundred million Saudi Riyals (SAR 100,000,000) during the last complete fiscal year. There is no indication in the New Law or the New Implementing Regulations as to whether this is a worldwide threshold or a domestic threshold. Absent any such express indication, this amount should be interpreted as referring to combined worldwide turnover.
- The New Implementing Regulations define the concept of "economic concentration" as "action involving the complete or partial transfer of ownership of assets, rights, shares, stocks or obligations of an entity to another entity through merger, purchase, acquisition or the grouping of two or more departments under joint management, or otherwise by any other means resulting in control over an entity or more, including influence on its decisions, formation of administration body, or voting mechanism."
- In the absence of any *de minimis* or exceptions to the definitions above, the acquisition of any shares or assets, the formation of any joint-venture companies, any merger or any other restructuring, whether these transactions take place in

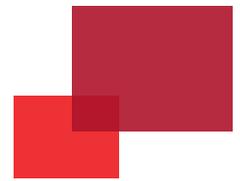


the Kingdom or abroad, are now subject to a merger control filing requirement if (i) the parties involved in such transactions have a combined worldwide annual turnover in excess one hundred million Saudi Riyals (SAR 100,000,000) and (ii) such transactions result in a change of control in favor of the purchaser, the joint-venture partner or the merging entity, as the case may be.

- The only exception set out in the New Implementing Regulations with respect to merger control is where the acquiring entity is an exempted owned-state company. In this case, it is not required to apply for a merger control clearance.
- The obligation to notify the Authority lies with all entities participating in the proposed transaction.
- The Authority now has up to (i) 30 calendar days to review the application and the supporting documents and to confirm whether the application is complete and then (ii) 90 calendar days to review the proposed transaction.
- The New Implementing Regulations grant broad powers to the Authority to supervise economic concentrations. The Authority may now request information, documents and data, inquire and visit premises of the parties or entities that may be affected by the proposed transactions (e.g. suppliers, competitors), whether or not such entities submitted a notice. The Authority may also ask the public to provide feedback on any economic concentration.
- The Authority may investigate and assess non-reported economic concentrations, request the termination of a reported economic concentration which has been completed before the issuance of the Authority's approval.
- The Authority may issue three types of decisions in relation to the reporting of an economic concentration: (i) an approval; (ii) a conditional approval; or (iii) a rejection. If the Authority fails to notify its decision to approve or reject the transaction within the 90-day period mentioned above, the parties may complete the transaction.

Exemptions

- The New Law includes a specific provision allowing companies to request from the Authority exemptions with respect to anti-competitive practices (whether anti-competitive practices and agreements under Article 5 or unilateral behaviors under Article 6) and merger control.
- The New Law and the New Implementing Regulations do not set a timeline for the review of exemption applications. Instead, the New Implementing Regulations provide that the Authority

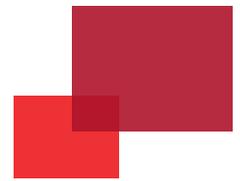


shall determine the assessment period on a case-by-case basis, starting from the date the application is made.

- The Board of Directors of the Authority (the "**Board**") may grant an exemption if it considers that the practice for which an exemption is requested will improve the performance of the market and/or improve the performance of entities in terms of products, technological advancement, and creative innovation. An exemption may only be granted if the benefits of the restriction outweigh the harm to competition.
- Pursuant to the New Implementing Regulation, the Authority may either approve, grant a conditional approval, or reject an application for exemption. The approval of an exemption is not permanent and may be revoked or extended in the future. An exemption may be withdrawn: (i) if the applicant breaches its obligations or commitments determined in the exemption decision, (ii) if the reason for the exemption is fulfilled, (iii) there has been a change in the market conditions and the level of competition, or (iv) the negative impact of the exempted practice on competition outweighs its positive effects. The Authority may extend the exemption period before its expiry on its own initiative or at the written request of the applicant.

Investigations and Dawn Raids

- The New Law and the New Implementing Regulations introduce new provisions on investigations and dawn raids by the Authority. The Board (or the Authority's Chairman or Governor in case of emergency, subject however to the approval of the Board at the first meeting following such decision) has the authority to initiate inquiries, investigations, research, collection of evidence regarding practices in violation of the New Law.
- The New Law grants broad powers to officials of the Authority designated by the Board to access premises within working hours, review books and documents, and take copies thereof. Such officials will have the capacity of judicial investigation officers and will be entitled to support competition cases by all means, including on the basis of soft statements generated by computers, telephone recordings, facsimile transmissions, and e-mails. The officials of the Authority may also investigate and question shareholders, managers and employees. Designated officials may seek the assistance of the competent authorities, including security authorities, when discharging their duties.
- Entities must provide the Authority with any requested data, information, documents, or exhibits to conduct market studies, evidence-gathering, and investigation. They shall not withhold information from designated officials, provide misleading information, conceal or destroy documents or exhibits

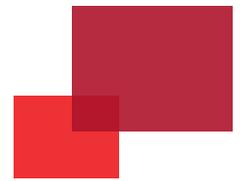


necessary for the investigation for confidentiality reasons or otherwise.

- Any person violating the provisions relating to investigations and dawn raids may be subject to a fine not exceeding 5% of the total annual value of sales (turnover), or not exceeding five million Saudi Riyals (SAR 5,000,000) if it is impossible to estimate the turnover.

Fines

- The Previous Law provided that fines not exceeding 10% of the total annual value of sales (turnover), or ten million Saudi Riyals (SAR 10,000,000) if it is impossible to estimate the turnover, could be imposed on violators.
- Under the New Law, any company/person violating the provisions of Articles 5 (general anti-competitive practices), 6 (anti-competitive practices for dominant entities), 7 and 11 (merger control requirements) may be subject to a fine not exceeding 10% of the total annual value of sales (turnover) that are the subject matter of the violation, or not exceeding ten million Saudi Riyals (SAR 10,000,000) if it is impossible to estimate the turnover.
- In addition, the Committee for the Resolution of Violations of the Law may, at its discretion, alternatively resort to imposing a fine not exceeding three times the proceeds realized by the violator as a result of the violation.
- In case of recurrence, the Committee for the Resolution of Violations of the Law may multiply the fine imposed for the first time violation.
- The New Law also introduces a new 'catch all' fine applicable to anyone violating any other provisions of the New Law or its New Implementing Regulations in an amount not to exceed two million Saudi Riyals (SAR 2,000,000).
- In addition to the other remedies also available to the Authority under the Previous Law (e.g. requiring the violator to dispose of some of its assets, imposing a daily fine not exceeding ten thousand Saudi Riyals (SAR 10,000) until the violation is remedied), the New Law authorizes the Authority to close down the violating entity for a period not exceeding 30 days if such violator fails to remedy the violation within 90 days from the date it is notified of the violation.
- The New Implementing Regulations also provide that (without prejudice to any penalty provided for in the New Law or any other law, an entity that offers any gifts, donations, endowments, wills, grants, and financial aids to the Authority or its employees during the performance of its assigned works, in order to influence any action that would prejudice the



fairness and integrity of the inspection or investigation, shall be subject to a fine not exceeding SAR 2,000,000, in accordance with Article 20 of the Law.

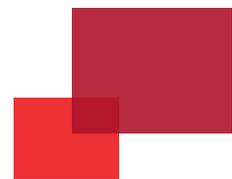
- As a general rule, penalties are cumulative. The imposition of a penalty does not preclude the Authority from imposing additional fines or taking additional measures or proceedings in respect of other violations of the New Law.

Leniency

- The New Law and the New Implementing Regulations introduce rules regarding leniency and settlement.
- The New Implementing Regulations provide that leniency may be requested only by one applicant (i.e. the first entity to apply for leniency) which must proactively provide evidence relating to its partners violating the New Law.
- The New Implementing Regulations clarify that an application for leniency or settlement may be requested before or after a decision to investigate and collect evidences has been issued, but not after a decision has been taken to institute criminal proceedings against the alleged violator.
- If the Board decides to approve an application for leniency or settlement, no proceedings shall be instituted before the Committee for the Resolution of Violations of the Law against the entity which was granted leniency or settlement. The Board may however take other measures in accordance with the provisions of the New Law and the New Implementing Regulations. If an entity accepts a settlement, it shall pay the settlement amount determined by the Board, as well as any compensation amount to the affected parties as may be determined by the Board.
- The Authority must notify the applicant of the Board's decision on a leniency or settlement application within a period not exceeding 120 days from the date of the submission of the complete request.

Committee for the Resolution of Violations of the Law

- Under the New Law and the New Implementing Regulations, the Board shall constitute a Committee for the Resolution of Violations of the Law (the "**Committee**") composed of five Board members. The Committee shall be competent to settle all cases arising under the New Law or the New Implementing Regulations (save for violations committed by officials of the Authority or Board members e.g. breach of their confidentiality obligations or of the conflict of interests rules).
- Hearings held by the Committee are public, unless the Committee decides otherwise. Proceedings and pleading are in writing.



- The Committee's decisions are considered final if the parties do not appeal before the competent court within thirty days from the date of notification of the Committee's decision.

For further details on the New Competition Law and its practical impact on your operations in Saudi Arabia, please do not hesitate to contact our Saudi Competition team.



David Monnier
Head of the Saudi
Competition Practice

+966 11 265 8928
David.Monnier@bakermckenzie.com



George Sayen
Head of the Saudi
focused M&A Practice

+966 11 265 8911
George.Sayen@bakermckenzie.com



Abdulrahman AlAjlan
Head of the Saudi
Litigation Practice

+966 11 265 8948
Abdulrahman.Alajlan@bakermckenzie.com



Samar Baharon
Associate

+966 12606 6200
Samar.Baharon@bakermckenzie.com