

Saudi Arabia's New Competition Law Goes Into Effect

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The Kingdom of Saudi Arabia's new competition regime has gone into effect with potentially significant implications for businesses which are active in the Kingdom and those considering transactions with a Saudi component. The new Competition Law was issued by Royal Decree on 6 March 2019,¹ but did not go into effect until 25 September 2019. The Implementing Regulations for the new Law were issued by the General Authority for Competition ("Authority") on 25 September 2019.² Companies that generate turnover in the Kingdom, whether based in the Kingdom or not, could now be subject to the provisions of this new Law and Implementing Regulations.

The new Saudi competition regime includes pre-merger notification requirements with relatively low reporting thresholds, a lengthy waiting period for clearance (90+ days), and potentially large fines for violations of the Law. The competition regime includes provisions that address infringements by conduct and criminal penalties. This alert provides an overview of some of the key features of this new regime.

Broad Jurisdictional Powers

The new Law and Implementing Regulations apply broadly to any "activity involving production, distribution, purchase, or sale of commodities," as well as "any commercial, agricultural, industrial, service, or professional activity" in the Kingdom.³ The application of the new Law also extends to foreign "[p]ractices occurring outside the Kingdom that have an adverse effect on fair competition within the Kingdom."⁴ The Implementing Regulations further provide that digital applications and electronic platforms fall within the jurisdiction of the new Law, if their conduct has an impact inside the Kingdom—whether or not they are licensed to operate in the Kingdom.⁵

The new Law does exempt public establishments and State-owned companies that are solely authorized by the government to provide commodities or services in a given specific field.⁶

The new Law tasks the Authority with enforcement and grants it original jurisdiction over any potential "inconsistencies or overlap with the jurisdictions of other governmental bodies" that may arise from application

¹ Royal Decree No. (M/75), dated 6 March 2019, and published in the Official Gazette on 29 March 2019 ("Competition Law").

² Resolution No. (337) of the Authority Board of Directors, dated 25 September 2019, approving the Implementing Regulations ("Implementing Regulations").

³ Competition Law, Articles 1 and 3(1)(a); Implementing Regulations, Article 1.

⁴ Competition Law, Article 3(1)(b).

⁵ Implementing Regulations, Article 3(1)(d).

⁶ Implementing Regulations, Article 4(1).

of the new Law.⁷ The Authority is headed by a Board of Directors that consists of a Chairman appointed by Royal Order, a Governor, four Government representatives,⁸ and four representatives with expertise in relevant fields who are appointed by the Council of Ministers based on the proposal of the Chairman.⁹

Prohibited Anticompetitive Conduct & Investigations

New prohibitions on horizontal and vertical agreements. Article 5 of the new Law prohibits any agreement, whether horizontal or vertical, among any entities “if the purpose or effect of which undermines competition,” including a list of examples such as:¹⁰

- Fixing or suggesting prices or terms of sale;¹¹
- Setting production volumes, sizes or weights;
- Limiting the free flow of goods or services by refusal to deal in a particular market.
- Obstructing entry of potential new competitors;
- Allocation of markets based on geography, customer, distribution center, or timing;
- Freezing or limiting manufacturing, development, marketing, and other forms of investments; and
- Coordinating or colluding on bid submissions.

Concerted conduct among competitors. The Implementing Regulations further identify a subset of specific prohibited conduct that would be considered an automatic (*i.e.*, *per se*) violation of the new Law if undertaken by agreement among actual or potential competitors, including:¹²

- Fixing product prices or terms of sale;
- Denying a particular entity or entities access to goods and services available in the market;
- Allocating markets based on geography, distribution centers, type of customers, or time-periods; or
- Coordinating on bids or proposals, except for joint bids that are disclosed in advance.

Dominant-firm conduct. Article 6 of the new Law prohibits entities with a “dominant position” from engaging in certain activities to undermine competition. The Implementing Regulations define “Dominant Position” as any entity— or group of entities—acting with a common will in committing the violation or causing its effect, which have:¹³

- A combined market share of 40% or more; or
- The ability to influence the market, such as controlling prices, production, or demand.

The Implementing Regulations consider certain activities by entities with a Dominant Position as automatic violations, including:¹⁴

- Imposing a condition on one entity not to deal with another (*i.e.*, refusal to deal); or

⁷ Competition Law, Article 3(3).

⁸ These four members represent the Ministries of Trade and Investment; Finance; Economy and Planning; and Energy, Industry, and Mineral Wealth.

⁹ See Authority Statute, issued by Council of Ministers Resolution No. (55), dated 11 October 2017, Article 4(1).

¹⁰ Competition Law, Article 5.

¹¹ See *also* Competition Law, Article 4 (“The prices of goods and services shall be in accordance with the rules of the market and the principles of free competition, except for the prices of goods and services determined by a Council of Ministers resolution or under a law.”).

¹² Implementing Regulations, Article 8(2).

¹³ Implementing Regulations, Article 10.

¹⁴ Implementing Regulations, Article 9(2).

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- Conditioning the sale of one product on accepting the sale of another unrelated product (*i.e.*, tying arrangements).

Broad investigatory powers. In order to detect anticompetitive conduct, the new Law and Implementing Regulations grant Authority staff the power to enter business premises to investigate activities and seize company files, documents, data, computers and other equipment, including confidential materials.¹⁵ The Authority may rely on law enforcement and security agencies to pursue its investigative responsibilities. The Authority staff are bound by a duty of confidentiality, and the new Law imposes a heavy fine on any member of Authority staff that discloses any confidential information obtained during the course of their work for personal benefit.¹⁶

Merger Control

A key feature of the new Law is the introduction of a notably low turnover threshold triggering a notification requirement for parties seeking to participate in an “Economic Concentration” transaction.¹⁷ Such a notification launches a lengthy review process with broad powers granted to the Authority.

Notably Low Reporting Threshold for Transactions. The Implementing Regulations provide that entities intending to participate in an Economic Concentration transaction, such as a merger, acquisition, takeover, or joint venture, must notify the Authority and obtain clearance prior to completing the transaction,¹⁸ if the total combined turnover of the participating entities exceeds 100 million Saudi Riyals (US\$26.6 million).¹⁹

The Implementing Regulations do not explicitly limit the threshold calculation to turnover generated inside the Kingdom. In practice, however, it may be difficult for the Authority to demonstrate the domestic effect of a transaction if the relevant turnover amount is not tied to domestic activity. It is likely the Authority will only require notification when a transaction meets the threshold based on turnover within the Kingdom.

The Implementing Regulations, however, do not specify separate minimum thresholds for each of the parties to a transaction. Therefore, the Implementing Regulations appear to require notification if only one of the parties meets this turnover threshold in the Kingdom, even if all other parties have no turnover in the Kingdom.

The broad language of the Implementing Regulations and the low turnover threshold may lead to a significant increase in the number of transactions that must now be filed for competition approval in the Kingdom.

Extraterritorial Reach. Any company that generates more than US\$26.6 million in turnover—including foreign companies with no assets in the Kingdom—could be required to notify the Authority of its proposed transactions anywhere in the world, even if such transactions have no effect in, or any connection to, the Kingdom. This will create burdensome regulatory hurdles for these companies and add unnecessary workload to the Authority staff who are responsible for reviewing, investigating, and approving these transactions that may have limited, if any, effect on competition within the Kingdom.

90+ Days Waiting Period. The new Law and Implementing Regulations establish a lengthy waiting period that suspends transactions until the Authority completes its review. Under the new Law, parties are not permitted to close a transaction for 90 days after filing their notification and the Authority confirms it has received all necessary documents and information.²⁰ In practice, however, the waiting period may extend longer because, even after such confirmation, the Authority maintains the right to request additional information, suspending the 90-day clock until the additional information is provided.²¹

15 Competition Law, Article 15; Implementing Regulations, Article 37.

16 Competition Law, Article 24.

17 “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 an entity to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or by any other means, whether directly or indirectly.” Implementing Regulations, Article 1.

18 Competition Law, Article 7; Implementing Regulations, Article 12(1).

19 Implementing Regulations, Article 12(1). The US Dollar amount is based on the current exchange rate of USD1 to 3.75 SAR as of 6 November 2019.

20 Implementing Regulations, Article 14(1).

21 Implementing Regulations, Article 15(2).

Parties are also required to submit a filing fee. The Implementing Regulations do not specify the amount of such fee, or the party responsible for payment, leaving such matters to be determined by the Authority in the future.²²

Broad investigative powers. In addition to filing specific forms—to be provided by the Authority in due course—parties are required to submit with their notification a document describing the proposed transaction and its parties, relevant markets and sectors, top competitors and customers, and likely effect on competition generally. When investigating a proposed transaction, the Authority can request any information, documents, or data it deems necessary for its review.²³ If the parties fail to comply with the Authority's requests (or fail to provide acceptable justifications for delayed compliance) within 15 days, the Implementing Regulations empower the Authority to block the transaction.²⁴ Moreover, the Implementing Regulations empower the Authority to undertake public consultations or conduct inspections at the premises of relevant parties or others in the relevant industry to assist in the staff's analysis of the proposed transaction.²⁵

Criminal Liability and Large Fines

Failure to comply with the provisions of the new Law exposes individuals to criminal liability and corporations to potentially large fines. If the Authority concludes an entity has violated the new Law, the Authority has several enforcement tools at its disposal, including the right to initiate criminal proceedings and impose fines.²⁶ Engaging in prohibited anticompetitive conduct or closing a transaction without obtaining the requisite clearance could subject an entity to fines of up to 10% of the value of sales at issue.²⁷ Under certain circumstances, including repeated offenses, the Authority could impose a fine in an amount up to triple the profit generated from the alleged violation.²⁸ In addition, the Authority may impose fines on individuals for up to 2 million Saudi Riyals (approximately US\$533,000).²⁹ Parties may appeal the Authority's decision to a court of law.

The Authority, however, may grant amnesty to entities or persons that participate in prohibited conduct if they voluntarily provide the Authority with evidence against other participants in the violation.³⁰ The Implementing Regulations empower the Authority to accept or deny amnesty applications at its discretion.³¹

Conclusion

Companies with any activity in the Kingdom should consider evaluating their agreements and business practices in light of the new regime. In addition, companies considering potential transactions with any party that generates turnover in the Kingdom should carefully assess whether a merger filing is required there. The notably low notification threshold might necessitate a filing even for foreign-to-foreign transactions with limited connection to the Kingdom. The broad powers granted to the Authority coupled with the potentially lengthy statutory waiting period could result in significant delays and costly procedures to comply with the new merger control requirements. It will be important to monitor how the Authority and Saudi courts interpret the new provisions in practice. Companies should seek specialized legal advice to ensure compliance with the new Law and avoid potential large fines or criminal liability.

22 Implementing Regulations, Article 13.

23 Implementing Regulations, Article 14(5).

24 Implementing Regulations, Article 19(3).

25 Implementing Regulations, Article 21.

26 Competition Law, Article 14; Implementing Regulations, Article 52.

27 Competition Law, Article 19.

28 Competition Law, Article 19.

29 Competition Law, Article 20. *See also*, Implementing Regulations, Article 51 (providing that any entity or person that offers gifts, donations, endowments, wills, grants, or aids to the Authority officials during the performance of their assigned duties will be subject to a fine not exceeding 2 million Saudi Riyals).

30 Competition Law, Article 23.

31 Implementing Regulations, Article 55.

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