

## CLIENT ALERT: THE GENERAL AUTHORITY FOR COMPETITION'S NEW ECONOMIC CONCENTRATION REVIEW GUIDELINES ARE PUBLISHED

The General Authority for Competition ("**GAC**") has now issued revised Economic Concentration Review Guidelines (the "**New Guidelines**"). The New Guidelines set out GAC's approach to the requirement to notify qualifying mergers, acquisitions and joint ventures (the "**Merger Notification Requirement**"), as set out in Article 7 of the Saudi Competition Law (the "**Competition Law**"), superseding its previous Merger Review Guidelines (the "**Previous Guidelines**"). It is important to note that neither the New Guidelines nor the Previous Guidelines impose any obligation on GAC in relation to the implementation or interpretation of the Competition Law and its implementing regulations. Although much in the New Guidelines remains the same as in the Previous Guidelines, there are some substantive changes.

In this briefing, we set out the substantive changes between the New Guidelines and the Previous Guidelines and also some points to note regarding GAC's approach in relation to merger control in Saudi Arabia, as set out in the New Guidelines.

The New Guidelines set out an approach to merger control which is often in line with European and international merger control and antitrust principles. However, there are some important departures.

### Application of the Merger Notification Requirement to undertakings operating outside of Saudi Arabia

A key question in the application of the Merger Notification Requirement is when does it apply in the case of transactions involving undertakings operating outside of Saudi Arabia, i.e. in what cases will there be sufficient nexus between economic activity outside of Saudi Arabia and the Saudi market for GAC to have jurisdiction over that activity? To some extent, GAC has clarified the answer to this question in the New Guidelines. However, some uncertainty remains.

As in the Previous Guidelines, the New Guidelines provide that GAC will consider itself to have jurisdiction over activity outside of Saudi Arabia where the potential effect of that activity in Saudi Arabia is *direct, substantial and reasonably foreseeable*. GAC has now clarified that such potential effect will

#### Key changes

- New turnover thresholds require that, in the case of acquisitions, the target must have some turnover in Saudi Arabia.
- Concept of positive, negative and joint control explicitly set out in reference to changes of control.
- Certain joint ventures, bringing new products to Saudi Arabia, exempted from the Merger Notification Requirement.
- No longer any requirement on sellers to produce supporting documents for merger notifications.
- GAC approvals now valid for one year.

generally create a sufficient nexus where any one or more of the parties to a transaction has more than SAR 40 million turnover in Saudi Arabia.

This is welcome clarification. However, subject to further amendments that have been made in relation to the turnover thresholds, the operation of this nexus guidance will not rule out parties having to notify where they have either (i) operations substantially outside of Saudi Arabia (e.g. where a party has operations outside of Saudi Arabia which generate turnover of many multiples of SAR 40 million) or (ii) operations outside of Saudi Arabia in wholly different product or service markets than those they operate in Saudi Arabia.

It is also not clear whether, when the SAR 40 million turnover threshold (along with the other thresholds) are met, a merger notification ought to be made in order for GAC to determine that it does not have jurisdiction over the relevant transaction, or whether parties can self-assess as to whether the transaction constitutes economic activity which has a direct, substantial and reasonably foreseeable effect on the Saudi market.

As in the Previous Guidelines, the New Guidelines provide that GAC will decide nexus on a case-by-case basis and encourage parties to approach GAC for discussions in "cases of doubt". This suggests that self-assessment may be possible in cases of no doubt. However, given the lack of clarity, it may be better to consult GAC in all cases where there is a genuine question as to whether there is a direct, substantial and reasonably foreseeable effect on the Saudi market.

## **Change of control**

The New Guidelines expand on the scenarios where a change of control can occur. The New Guidelines confirm that a change of control is a necessary component of any 'economic concentration'. An economic concentration is any action that, in short, transfers assets of any kind (as, very broadly, set out in the definition of 'economic concentration', in the Competition Law) from one undertaking to another. As with the Previous Guidelines, the New Guidelines clarify that the change of control element of an economic concentration must be present for it to be notifiable under the Merger Notification Requirement.

The New Guidelines deal with the concept of 'negative' and 'positive' control, confirming where changes in these types of control over undertakings will engage the Merger Notification Requirement.

'Control' is the ability of an undertaking, individually or jointly, to decisively influence the strategic or operational decisions of another entity. Generally, this will comprise a power to control the budget, determine major investments and appoint senior management.

The New Guidelines clarify that control can be expressed as the ability to block certain decisions (negative control) or the ability to impose decisions (positive control) regarding the entity's strategic and business actions.

The New Guidelines clarify that changes in shareholder structure or rights (e.g. through a new shareholders' agreement) may result in a change of control. This may occur where an existing shareholder acquires negative or positive control that it did not previously have. Such change may result in an economic concentration where a notification under the Merger Notification Requirement may be necessary.

## **Joint ventures**

As in the Previous Guidelines, the New Guidelines clarify that only 'full function' joint ventures are notifiable under the Merger Notification Requirement. Such joint ventures have, in short, economic autonomy from their parent entities and

are able to act independently on the market, e.g. by making sales to third parties.

The New Guidelines carve out certain joint ventures from the Merger Notification Requirement if they are capable of achieving significant economic benefits without negatively affecting competition. Such joint ventures may contribute to attracting foreign investment, localising industries, and transferring knowledge, provided they meet certain conditions based on the nature of the transaction, including, but not limited to:

- i. The joint venture relates to the manufacture of a product that is not currently produced in Saudi Arabia, or where the product is manufactured in Saudi Arabia but can only be distributed to a limited part of Saudi Arabia *"for technical reasons inherent in the nature of the product"*.
- ii. The joint venture consists of parties who are not current or potential competitors in respect of the product produced by the joint venture.

The New Guidelines preface these carve-outs by referring to joint ventures between Saudi and foreign entities. Therefore, it may be the position that GAC will only apply these carve-outs in the case of Saudi/foreign joint ventures (and not in the case of a joint venture established solely by Saudi entities).

The text of the New Guidelines also suggests that the two carve-outs are cumulative and not separate, i.e. they are each two limbs of a single carve-out, with both limbs having to be satisfied.

A potential exemption from the Merger Notification Requirement on the basis of efficiency has been retained from the Previous Guidelines. Parties will need to demonstrate that the transaction *"(1) leads to an improvement in market or firm performance in terms of quality, diversification, technological development, or innovative efficiency; (2) [p]rovides benefits to consumers that outweigh the negative effects of restricting competition; and (3) [d]oes not allow the exempted firm(s) to restrict competition or exclude competitors from any market"*.

## Investment funds

The New Guidelines refer to economic concentrations by investment funds. Although no definition is given of the term 'investment funds', the example of pension funds is provided.

Investments into undertakings by investment funds may not be notifiable under the Merger Notification Requirement. GAC will consider such transactions as not notifiable where the acquiring investment fund has control but:

- i. *"The sole objective of the acquisition is to obtain shares without intervening directly or indirectly in the management of those entities, and therefore control will not be used to influence the entity's behaviour in the market, but only to maintain the value and diversity of the investment. The objective of the investment should be determined objectively; the intention should be not to exercise control and influence in the management of the entity, and this should be clearly established."*
- ii. *The investment fund does not own a controlling stake in any companies competing with the target company according to the definition of the relevant market."*

The reference to not owning controlling stakes in any companies competing with the target is clear and prevents 'roll up' strategies where investment funds will buy up competing undertakings in order to maximise the fund's return by influencing the commercial strategy of each acquired undertaking in

coordination with the commercial strategy of the entire portfolio of acquired competing undertakings.

However, investment funds will often only take shareholdings in undertakings in order to influence the commercial or financial strategy of a company to allow for the fund's exit from the undertaking at a future date, without directly or indirectly intervening in the management of the undertaking. It is unclear whether such overall influence would be considered by GAC as the exercise of "*control and influence in the management of the entity*". Similarly, any major investor in a company will often take a position on the board of the target entity. It is unclear whether this would amount to control and influence that would render the investment notifiable.

Further, it is unclear how the carve-out for investment funds interacts with GAC's guidance regarding a party having potential control being considered to be akin to having actual control (and any change in such potential control engaging the Merger Notification Requirement) as any acquisition by an investment fund of a controlling stake in an undertaking will, notwithstanding any intention to the contrary, give that investment fund potential control of the entity.

## Turnover thresholds

The New Guidelines clarify the application of the turnover thresholds, the meeting of which will engage the Merger Notification Requirement.

The thresholds are now:

- A. the total worldwide annual sales value of economic concentration parties exceeds 200 million Saudi Riyals;
- B. the total worldwide annual sales value of the target establishment exceeds 40 million Saudi Riyals; and
- C. the total annual sales value in the Kingdom of all economic concentration parties exceeds 40 million Saudi Riyals.

The New Guidelines differentiate between acquisitions, mergers and joint ventures in the application of the turnover thresholds.

In respect of acquisitions, the New Guidelines provide that if only the acquirer has turnover in Saudi Arabia, GAC will consider it very unlikely that this would result in material negative effects on competition in Saudi Arabia. The New Guidelines further clarify that the target entity must contribute to the parties' turnover in Saudi Arabia (criterion B above).

In respect of mergers, the New Guidelines provide that mergers involving one larger undertaking and one smaller undertaking should not trigger the Merger Notification Requirement if the smaller undertaking has total worldwide annual sales of SAR 40 million or less.

In respect of joint ventures, full function joint ventures should not engage the Merger Notification Requirement unless at least two of the shareholders each have total worldwide annual sales that exceed SAR 40 million.

This is helpful further guidance on nexus. However, the contribution to Saudi turnover required from the target in acquisitions is not defined, either in concrete terms or in terms of guidance. Therefore, potentially very low target turnover in Saudi Arabia could still trigger the Merger Notification Requirement. Even where target turnover is high in Saudi Arabia, transactions where the parties are substantially operating outside of Saudi Arabia or operating in Saudi Arabia in

markets which are different to the subject matter of the acquisition will still be caught by the Merger Notification Requirement.

Further, as the target's contribution to turnover threshold B is required in respect of acquisitions only, mergers and joint ventures with no actual nexus to Saudi Arabia may still be caught by the Merger Notification Requirement.

### **Required supporting documents**

In contrast to the Previous Guidelines, the New Guidelines appear to have dropped the requirement for supporting documents to be provided by a seller in an acquisition, with only the acquirer and the target having to provide documents. However, it is possible that GAC may update the required supporting documents list on its official website at any time.

### **Validity period approvals**

Approvals are now valid for a year from issuance, although parties can apply for an extension of this period with reasons.

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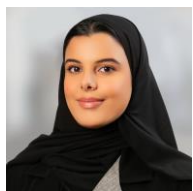
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