

## Client Alert

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## Saudi Arabia issues merger control guidelines - What is new?

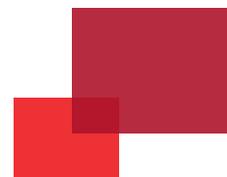
Saudi Arabia

On 06/8/1441H (corresponding to 30 March 2020), the General Authority for Competition (the "**Authority**") issued the anticipated Merger Control Guidelines (the "**Guidelines**") that aim to provide some clarification and interpretative guidance on merger control related provisions of the Competition Law issued by Royal Decree no. M/75 dated 29/6/1440H (corresponding to 6 March 2019 (the "**Competition Law**") and its Implementing Regulations issued by a resolution of the Board of Directors of the Authority on 25/1/1441H (corresponding to 24 September 2019) (the "**Implementing Regulations**").

This alert summarizes the most significant provisions of the Guidelines.

### Notifiable Transactions under the Competition Law and the Implementing Regulations

- In their introduction, the Guidelines highlight that 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)*.
- The concept of *economic concentration* is defined in Article 1 of the Competition Law as any "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."
- There are therefore only three criteria to be met for a transaction to be notifiable to the Authority:
  - i. The transaction must involve the complete or partial transfer of ownership of assets, rights, shares, stocks or obligations of an entity to another entity. This includes for instance acquisitions or transfers of shares or assets, mergers, issuance of shares in favor of a new shareholder. The reference to the "grouping of two or more departments under joint management" is intended to capture joint-ventures and consortia for instance;
  - ii. The transaction must result in a result in a change of control in favor of the purchaser, the joint-venture partner or the merging entity, as the case may be. Please note that the concept of "control" is not precisely defined in the Competition Law or its Implementing Regulations but includes having a board seat or some influence over the decision making process (e.g. veto rights or reserved matters). Change of control is therefore

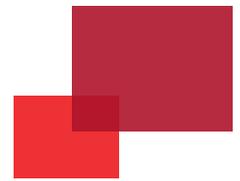


triggered not only in the context of the acquisition of a majority stake in a target company; and

- iii. the total annual value of sales of the parties involved in the transaction exceeds one hundred million Saudi Riyals (SAR 100,000,000).
- Unless all parties participating in the transaction are exempt from the application of the Competition Law, there are no further requirements for a transaction to be notifiable under the Competition Law or its Implementing Regulations (e.g. no *de minimis* or exceptions to the definitions above, and no requirement for dominance post-transaction).
  - Therefore, the acquisition of any shares or assets, the issuance of shares, including in joint-venture companies, any merger or any other restructuring, including internal restructurings are notifiable to the Authority whether these transactions take place in the Kingdom or abroad, if they meets the criteria listed above. It is however unclear at this stage whether the formation of joint-ventures companies are notifiable to the Authority.

## Calculation of the Merger Control Threshold

- There is no indication in the Competition Law or its Implementing Regulations whether the threshold of one hundred million Saudi Riyals (SAR 100,000,000) is to be calculated on a worldwide or on a domestic basis. The Guidelines clarify that the Authority takes into account the value of total sales collected at the group level on a worldwide basis of all entities participating in the proposed economic concentration.
- The Guidelines also provide that, for the purpose of calculating the total annual value of sales, all entities engaging in a commercial activity and having a direct involvement in an economic concentration shall be considered as participating entities, including:
  - i. in the context of an acquisition, the purchaser(s), the seller(s) and the target(s);
  - ii. in the context of a merger, the merging entity and the merged entity;
  - iii. in the context of a joint-venture company, the shareholders that jointly control the joint venture, in addition to the joint venture company itself. There is no definition of joint control or control in the Guidelines, so it would be safe to assume that the broad concept of control set out in the definition of economic concentration (i.e. having a board seat or some influence over the decision making process (e.g. veto rights or reserved matters) should apply to joint-venture companies as well.

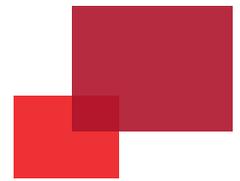


## Calculation of the Total Annual Value of Sales

- The total annual value of sales is calculated as the total amount collected by an entity from the sale of goods and/or services as part of its commercial activities and related activities. The Guidelines confirm the all-encompassing approach of the Authority in this respect: the total annual value of sales is not only calculated based on the goods and/or services that are relevant to the economic concentration, but rather includes all of the goods and/or services sold by the entities participating in the proposed economic concentration.
- For entities with financial statements issued in accordance with the standards of the Saudi Organization for Certified Public Accountants or equivalent accounting standards applicable in the entity's country of origin, the total annual value of sales shall be the total revenues recorded the latest audited financial statements.
- In relation to entities that are not required to issue audited financial statements, the total annual value of sales shall be the revenue recorded in the latest profit and loss account prepared in accordance with the standards of Saudi Organization for Certified Public Accountants or similar standards adopted by the respective entity.
- The Guidelines provide that if the financial statements or profit and loss account are published in a foreign currency, then the total annual value of sales shall be converted into Saudi Riyals according to the Saudi Arabian Monetary Agency (“**SAMA**”)’s indicated exchange rate for the relevant fiscal year. The website of SAMA only shows daily and monthly conversion rates, so in practice the total annual value of sales will likely have to be converted on the basis of the daily rate for the 31 December of the relevant financial year.
- In any event, the total annual value of sales must appropriately reflects the sales that an entity generated in the ordinary course of business.
- In relation to banking and similar lending entities, the total sales shall be calculated as the sum of interest (and similar income), income generated from securities, (collected or due) commissions, net profit generated from financial transactions and other operating revenues.
- For insurance companies, the total sales shall comprise the amount of total underwritten premiums including all amounts collected and due under insurance contracts issued by or on behalf of the insurance company.

## Groups of Companies

- In the event an entity is part of a group constituting a “single economic entity”, then the total annual value of sales to be considered for merger control purposes shall be the total sales revenue of the entire group constituting a single economic entity, i.e. the ultimate parent company and all other entities directly or indirectly controlled thereby.



- The revenues generated from intragroup transactions shall be excluded from the calculation of the total annual value of sales. When a group of companies issues consolidated financial statements, the total revenues recorded therein shall be the total annual value of sales for the group for merger control purposes.

## Financial Periods to be Considered

- For companies with audited financial statements, the total annual value of sales shall be determined over a full financial year in accordance with its latest available audited financial statements.
- In the event where an entity does not have a determined financial year, the financial year to be used for the purpose of calculating the total annual value of sales shall be the latest calendar year where audited financial statements is available.
- In the event where an entity did not engage in a commercial activity for a full financial year, the total annual value of sales shall be based on an estimate in accordance with its activities (e.g. estimated value of sales for the whole year using a simple proportional approach).
- When it is not possible to determine the total annual value of sales of the respective entities, the revenues shall be calculated on a case-by-case basis.

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



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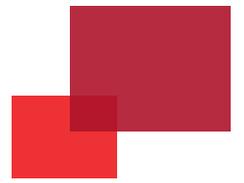
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