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The Saudi Arabian Competition Authority announces, following the adoption of the new Merger Review Guidelines, that it has blocked its first deal between two online food-delivery services due to their failure to provide sufficient information to enable the evaluation of the proposed acquisition (*Delivery Hero / The Chefz*)

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Tamer Nagy | White & Case (Washington)

Tilman Kuhn | White & Case (Dusseldorf)

Strati Sakellariou-Witt | White & Case (Brussels)

Reem Albakr | White & Case (Riyadh)

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The Kingdom of Saudi Arabia's General Authority for Competition (the "GAC") has been ramping up its merger control activities and recently—at least initially—blocked its first transaction, signaling plans for more active merger enforcement. Although Saudi Arabia's current merger control regime is relatively nascent, having come into effect under a new Competition Law and Implementing Regulations in late 2019 [7], the GAC nonetheless has made considerable strides in streamlining its merger review procedures and expanding enforcement. This note highlights key recent developments.

First Deal Rejection

Earlier this month, the GAC announced that it blocked its first deal. The GAC rejected the proposed acquisition of The Chefz, a Saudi-based online food delivery application, by Delivery Hero, a Germany-based service. The GAC's public announcement said it denied merger clearance because the parties did not provide sufficient information to enable the GAC to evaluate the transaction. It is unclear whether the GAC's decision is a final rejection of the deal or only a preliminary move to force the parties to submit additional information. Under either scenario, the

GAC's action against this major cross-border transaction is a warning shot that the GAC is serious about merger control compliance. The parties have the right to appeal the GAC's decision to a competent court of law but they have not announced their plans by the time of this publication.

Saudi Arabia's Merger Review Guidelines

The GAC's rejection comes on the heels of adopting new Merger Review Guidelines (the "Guidelines") that are inspired by international standards, such as the EU and US merger control regimes. The GAC issued the Guidelines in July 2021 in Arabic, and then recently published an English translation for wider exposure [2]. The Guidelines provide in-depth discussions and hypothetical examples for the various stages of merger filings and review, including the test and threshold for requiring notification, the information and materials required for filing, and the standards and process for the GAC's merger review. Among other topics, the Guidelines address the following issues:

A. Change of Control Required

The Guidelines confirm that if a transaction does not lead to a change of control over the target entity, then no GAC filing would be required. The Competition Law requires filing from parties intending to participate in an "Economic Concentration" if they meet the turnover threshold [3]. The Law defines Economic Concentration as "*any act that results in the total or partial transfer of ownership of assets, rights, equity, shares, or obligations of an entity to another, or the joining of two or more administrations in a joint administration,*" in accordance with the Implementing Regulations [4]. The latter specify that an Economic Concentration "*leads to the control of a firm(s) including influencing its decision, the organization of its administrative structure, or its voting system*" [5].

While prior to the issuance of the Guidelines it remained unclear how the GAC would analyze the elements of control, the Guidelines now clarify this by defining "control" as "*the ability to exercise decisive influence*" over the "*strategic or operational decisions*" of the target entity, including the appointment of senior management and approval of budgets, business plans and major investments [6]. This is similar to the approach on control taken by the European Commission under the EU Merger Regulation ("EUMR") and the European Commission's consolidated jurisdictional Notice ("CJN"). Therefore, it is now clear that transactions that do not result in a change of control (*e.g.*, acquisition of minority interests with no veto rights over strategic decisions or internal restructuring within the same corporate group) are in principle not notifiable.

B. Full-Function Joint Ventures

The Guidelines further clarify that a transaction in connection with a joint venture ("JV") is considered an Economic Concentration (and thus potentially notifiable) only if it results in a change of control or creates joint control over a full-function JV. The Guidelines define a full-function JV as "*an autonomous economic undertaking on a long-lasting basis,*" which is "*capable of bringing about a lasting change in the structure of the undertakings concerned and in the relevant market*" [7].

The full-function analysis under the Guidelines appears to be consistent with the European Commission's approach under the EUMR and CJN. Like the European Commission, to determine whether the JV qualifies as full function, the GAC will consider the totality of circumstances, including whether the JV: (i) operates as a standalone entity, independent from its parents; (ii) has management staff dedicated to its day-to-day operations; (iii) has access to sufficient resources, including finance, staff and assets; and (iv) is intended to operate for a sufficiently long period to bring about a lasting change [8].

C. Low Turnover Threshold and Broad Local Nexus Test

The Implementing Regulations established the filing threshold at a total combined turnover of the participating entities that exceeds 100 million Saudi Riyals (US\$26.6 million / €23.6 million) [9]. When the Implementing Regulations were issued in late 2019, some practitioners initially interpreted the threshold as requiring the parties to have generated that amount inside Saudi Arabia to trigger a filing requirement.

The GAC, however, has declined to limit the threshold to domestic turnover, confirming instead that the threshold is met whether parties generated that amount inside or outside Saudi Arabia, so long as the transaction “*may have an effect on a market in the Kingdom*” [10]. Although the Guidelines explain that such effect must be “*direct, substantial and reasonably foreseeable*,” the Guidelines also provide that for foreign transactions “*the GAC will consider it to be sufficient to establish a [local] nexus if one or more of the foreign undertakings has sales in Saudi Arabia*” [11]. The Guidelines further expand the local nexus interpretation by adding that “*sales in the Kingdom are not necessary to establish a sufficient nexus to a market in the Kingdom*” because a transaction may have an effect on competition in the Kingdom even when foreign firms “*may potentially be active in markets in Saudi Arabia, or are active (or may potentially be active) in foreign markets that are sufficiently closely connected to markets in Saudi Arabia*” [12].

The worldwide turnover threshold, coupled with this additional language as to the broad application of the local nexus test, will continue to capture a number of global transactions that may be required to file in Saudi Arabia despite the lack of a material effect on competition in Saudi Arabia. Failure to file a reportable transaction is subject to a fine of up to ten percent of annual sales—the GAC has so far sanctioned one transaction to date, imposing fines of 20 million Saudi Riyals (US\$5.3 million / €4.67 million) against each party according to initial reports [13]. The Saudi Administrative Court of Appeals upheld the GAC’s decision but set the fine at five million Saudi Riyals (US\$1.33 million / €1.16 million) [14].

D. Competitive Assessment Principles and Process

The Guidelines outline the substantive test the GAC will apply when assessing the competitive effects of a transaction, which seems generally to follow international standards, such as the EU and US approaches. The GAC will ask if the transaction will “*have the effect or likely effect of substantially lessening competition in a relevant market*” [15]. Defining the relevant market is an important first step in the analysis and the Guidelines indicate that the GAC will look for relevant demand-side and supply-side substitutes on a case-by-case basis, including by applying the Hypothetical Monopolist Test that is also used in the EU [16]. The Guidelines note that the analysis is forward-looking, comparing the likely competitive dynamics in the foreseeable future, with and without the proposed transaction.

A transaction may lessen competition “*by increasing the market power of one or more market participants,*” resulting in the ability “*to profitably raise their prices post-concentration for a sustained period*” or exercise such power in other ways, including to “*lower the quality of its products without a compensating reduction in price; reduce the range or variety of its products; lower customer service standards; and/or change any other parameter relevant to how it competes in the market*” [17].

In assessing this likelihood, the GAC will consider the market shares and concentration levels both before and after the transaction has been completed, relying on the Herfindahl-Hirschman Index (“**HHI**”) as a useful first tool, among others, in conducting this analysis [18]. The Herfindahl-Hirschman Index (“**HHI**”) is calculated by adding the sum of the squares of the post-merger market share of the merged firm and each rival firm in the

relevant market, thereby giving greater weight to the market shares of the larger firms. The GAC is unlikely to identify preliminary competitive concerns in a horizontal transaction if: (i) the post-merger HHI is below 1,000; (ii) the post-merger HHI is between 1,000 and 2,000 and the HHI delta is below 250; or (iii) if the post-merger HHI is above 2,000 but the HHI delta is below 150.

The HHI measure has been used in US merger analysis for many decades.]] Furthermore, the GAC may consider a transaction's potential efficiencies in the overall assessment, but only if the claimed efficiencies are of benefit to consumers, specific to the transaction in question, and verifiable [19]. For more details on the principles and process of the competitive assessment and the potential options for remedies, see Sections 8-11 of the Guidelines.

New Online Tools

The Competition Law provides for a suspensory period preventing closing of up to 90 days from filing completion [20], but the GAC typically responds sooner if the transaction does not raise any concerns. In an effort to streamline this filing process, the GAC has rolled out several new online tools. For example, the GAC has moved away from the two-step filing process (where parties had to file a short online form, followed by the submission of long forms via email). Instead, the GAC has introduced a new single online filing form to be submitted on the GAC's website on behalf of all parties. The online process has also enabled parties to track the status of their filings and has helped the GAC publish its decisions on regular basis, providing more transparency.

Furthermore, the GAC introduced a new self-guided questionnaire that allows interested parties to check whether a transaction is notifiable and another tool to calculate the filing fee [27]. Finally, the GAC also introduced a new online form to request a written certificate from the GAC confirming that a transaction is not notifiable in case of doubt—and the GAC commits to providing a response within 15 days.

Conclusion

Recent developments at the GAC indicate plans for more active merger control enforcement by the Saudi agency. The rollout of new guidelines and online tools reflect a strategic focus on expanding this regulatory role; and the first rejection of a cross-border transaction confirms the GAC's interest in serious enforcement. Companies contemplating a transaction involving business in Saudi Arabia should carefully consider the potential GAC filing requirements and related risks.

[1] See Saudi Arabia Competition Law, issued by Royal Decree No. (M/75), dated 6 March 2019 (the “**Competition Law**”); Implementing Regulations, issued by Resolution No. (337), dated 25 September 2019 (the “**Implementing Regulations**”).

[2] See General Authority for Competition, Merger Review Guidelines (2021) (“the **Guidelines**”), available in Arabic [at this link](#) ↗, and in English at [this link](#) ↗.

[3] Competition Law, Article 7.

[4] Competition Law, Article 1.

[5] Implementing Regulations, Article 1.

[6] Guidelines, Section 5.

[7] Guidelines, Section 5.

[8] Guidelines, Section 5.

[9] Implementing Regulations, Article 12(1).

[10] Guidelines, Section 4.

[11] Guidelines, Section 4.

[12] Guidelines, Section 4.

[13] *See, e.g.*, Gulf News, “Saudi Arabia: 4 companies fined 53m riyals for violating competition law,” dated 13 August 2020, available at [this link](#) ↗.

[14] *See* GAC Press Statement on Announced Sanctions, dated 22/2/1442H (9 October 2020G), available in Arabic at [this link](#) ↗.

[15] Guidelines, Section 4.

[16] *See* Guidelines, Section 9. The Hypothetical Monopolist Test examines potential substitutes by asking if there was a monopolist in the product or geographic region in question, and that monopolist increased its price by a small but appreciable amount, to what other products or geographic regions would customers readily switch.

[17] Guidelines, Section 8.

[18] *See* Guidelines, Section 10

[19] Guidelines, Section 10.

[20] Competition Law, Article 11.

[21] The filing fee is calculated as 0.02% the total annual sales of all entities participating in the Economic Concentration, capped at 400,000 Saudi Riyals (US\$106,621 / €94,632).