



# A real change?

Baker Botts analyses the new merger control thresholds in Saudi Arabia introduced by the GAC, highlighting the impact of the Competition Law on businesses in the Kingdom.

**O**n November 8, 2023, the Saudi Arabian General Authority for Competition (“GAC”) made a number of changes to its merger control filing thresholds. The new rules bring the Saudi merger regime closer to the ICN Recommended Practices for Merger Notification and Review Procedures and merger control practices in many jurisdictions. However, some concerns remain with regard to the proper scope of the GAC’s new filing thresholds and the impact of those rules on both foreign-to-foreign and local M&A transactions.

Until November 2023, the GAC’s Merger Review Guidelines stipulated that a notification to the GAC was required if the total annual sales of all the parties involved in an “economic concentration” exceeded SAR200 million (approximately USD53 million). Prior to March 15, 2023, a lower unitary threshold of SAR100 million applied. The new rules introduce two

additional (cumulative) thresholds that effectively exempt acquisitions of small target companies, as well as transactions that only involve firms with very limited revenues in the Kingdom of Saudi Arabia.

The applicable cumulative filing thresholds are now as follows:

1. The total combined worldwide revenues of the parties involved in the economic concentration must exceed SAR200 million (approximately USD53 million) in the previous financial year;
2. The total worldwide annual revenues of the target company must exceed SAR40 million (approximately USD10.6 million) in the previous financial year; and
3. The combined total revenues of the parties involved in the economic concentration in Saudi Arabia’s must exceed SAR40 million (approximately USD10.6 million).

The practical effect of the changes is that foreign-to-foreign M&A transactions



involving target companies with limited or no sales in Saudi Arabia are no longer notifiable in Saudi Arabia, provided that in addition the buyer and/or the seller have no meaningful sales in the Kingdom either. However, acquisitions of non-de minimis target companies with little sales in Saudi Arabia remain notifiable, if the buyer's and seller's group, together with the target group, exceed USD10.6 million revenues in the Kingdom. We expect the GAC's 2024 annual report to report on the impact of these changes on the number of filings of foreign-to-foreign transactions.

There is a widely held view that jurisdictions should only assert jurisdiction over transactions that have a material nexus to the reviewing jurisdiction and that jurisdictions should seek to screen out transactions that are unlikely to result in appreciable competitive effects within their territories. Moreover, a competition authority's determination of a transaction's nexus to its jurisdiction should preferably be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory.

While the new rules clearly present a step in the right direction, they could be further expanded and modified to reflect the local nexus principles more adequately. Many

commentators and practitioners would also welcome a recalibration of the notion of "economic concentration" and formally omitting the seller's activities from the analysis in the event of straightforward acquisitions.

Having said this, over the past few years, the GAC has made significant advances and has established itself as one of the authoritative, if not the most prominent, competition authorities in the region. Nowadays, the GAC routinely processes a few hundred merger notifications annually. The GAC's 2022 annual report states that in 2022 the GAC reviewed 316 notifications (compared to 291 and 132 in 2021 and 2020, respectively), all of which were approved except for 1, (128 out of which are "confirmation of no filing required"), with 20 of those requests involving joint ventures, 1 restructuring, 7 mergers and 148 notifications relating to acquisitions, with the remaining 11 filings stated to be still under review at the end of the year). This is indicative of not only greater awareness by market participants of the Kingdom's competition and merger control regime, but is also a sign of the increased sophistication of the GAC in dealing with various types and a larger number of notified economic concentrations. This trend is consistent with the awareness campaigns that the GAC supports with the objective of increasing awareness and compliance with the Competition Law.

Recent experiences have also seen marked changes to the economic analysis of transactions and business conduct. Nonetheless, the notification of mergers and other M&A transactions in the Kingdom may not always be straightforward.

Of increasing practical importance is the GAC's "confirmation of no filing required" procedure. Initially, this procedure served as an avenue for parties who were uncertain whether the concentration in question would potentially have adverse competitive concerns to the Saudi Arabian market and was somewhat similar to what is known in other jurisdictions as a short-form filing, in that it only requires the submission of high-level information about the parties and the transaction. This process does not command a filing fee and a decision by the GAC is issued within 15 business days of a complete application. In recent discussions with GAC personnel, however, we learned that government authorities in



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KSA (namely the Ministry of Commerce and the Ministry of Investment) would require the submission of a “confirmation of no filing required” certificate as part of the process to conclude any share transfer of a Saudi Arabian company. This means that parties will need to pass through the GAC for acquisitions involving any transfer of shares, even if the transaction in question does not meet the notification thresholds.

The GAC also actively investigates allegations of anti-competitive conduct and conducts market inquiries. For example, the GAC reported on 15 notifiable transactions in 2022 that were not notified, the majority of which were transactions in the information & telecommunication and manufacturing industries (markets that were also subject to the highest number of filings and clearances by the GAC). Most of the notifiable transactions that were not notified were acquisitions, but also included mergers and joint ventures. This indicates the GAC’s heightened interest in identifying and indeed penalising parties that fail to notify notifiable transactions.

Every calendar year, the GAC sets its sights on two or more markets in KSA that are of importance to the KSA’s national economy to identify any potential competitive concerns and to ensure the application of and compliance with the Competition Law in these sectors. In 2021, the GAC examined the medical insurance market and the market for the sale of automotive vehicles, spare parts and after-sale services. In 2022 and 2023, the GAC’s focus was on assessing the markets for the construction sector and the markets for agriculture and fishery.

In addition, on the enforcement side, the GAC actively encourages the submission of complaints of potential Competition Law violations. For example, in 2022, the GAC conducted investigations based on 117 complaints received through the GAC’s communication channels; 4 investigations were launched based on information transferred to the GAC by the Kingdom’s anti-corruption authority (Nazaha), while 5 other investigations started by the GAC’s own initiative. However, the results of the GAC’s investigations into violations vary. From the complaints received and investigated by the GAC in 2022, 23 violations were referred to judicial proceedings to impose fines on the violators, 16 violations were being considered for settlements with the

violators and 10 violations were further actioned (which could result in judicial proceedings or settlements).

In sum, in the past few years the GAC has become increasingly active and authoritative. In response to market realities, it has recently adjusted its merger control regime to align it more closely with foreign merger control regimes and is embarking on awareness initiatives to educate the public and the business community about the implications of the Competition Law and means to comply with it. Moreover, the GAC has been active in investigating markets of interest, encouraging and actioning complaints received from market participants and increasingly engages with market participants to ensure compliance in an attempt to ensure that markets are competitive and remain attractive for investors. 📌



Text by:

1. **PAUL LUGARD**, partner, Baker Botts LLP
2. **SHADI HAROON**, partner, Baker Botts LLP
3. **RAKAN ALYUSUF**, senior associate, Baker Botts LLP
4. **IDIL KART**, associate, Baker Botts LLP