

Introduction

On Friday 29 March 2019, the Kingdom of Saudi Arabia (the Kingdom) published its new Competition Law pursuant to Royal decree (M/75) dated 29/06/1440H (Corresponding to 07/03/2019G) (the New Law), replacing the then current Competition Law issued by Royal decree (M/25) dated 04/05/1425H (Corresponding to 22/06/2004G). The New Law comes into force 180 days from the date of its publication. It seeks to protect and encourage fair competition and combat and prevent monopolistic practices that affect legitimate competition or the interest of the consumer, leading to an improved 'market' environment and economic development. It is contemplated that the implementing regulations to the New Law will also be issued by the Board of the General Authority for Competition (the Board) within 180 days of the New Law's publication (the Implementing Regulations).

Council of Ministers resolution No. (55) dated 20/1/1439h (Corresponding to 11/10/2017) approved a change in the name of the "Council of Competition" to the "General Authority for Competition" (the General Authority). The General Authority is charged with the supervision and implementation of the new regime, whose stated intention is to protect and encourage fair competition and combat monopolistic practices that may affect lawful competition or the interest of the consumer. The General Authority shall operate under the Competition Law and Implementing Regulations to nurture a competitive business environment whilst preserving justice and transparency in the domestic market. In turn, firms should be placed to compete with freedom and fairness and provide consumers with the opportunity to reap the desired benefits of fair competition.

At Article 4, the New Law goes on to provide that the price of goods and services (save those fixed by decision of the Council of Ministers or prescribed at law) may then be determined by market forces and the principles of free competition.

Application

Article 3 provides that the New Law will apply to any:

- Natural or legal person conducting economic activity in the Kingdom (an Establishment)
- Practices conducted outside the Kingdom that prejudice fair competition (as understood by the New Law) inside the Kingdom

Public institutions and state-owned companies are excluded from the ambit of the New Law if they are solely authorised by the government to supply goods or services in a certain field.

Prohibitions

The New Law prohibits:

Article 5: Anti-competitive Practices

The New Law prohibits all practices, including agreements and/or contracts between Establishments – whether written or verbal, explicit or implicit – that are aimed at or may have the effect of prejudicing competition. Article 5 goes on to identify specific examples of practices, which are to be *de facto* considered as anti-competitive:

- Determining or proposing the price of goods, services, or the terms of sale or purchase
- Determining production volumes, the weights or quantities of goods or the discharge of a service
- Controlling the free flow of goods and services into or out of the market, whether totally or partially by concealing or storing them unlawfully, or preventing any trade in the same
- Any conduct that may obstruct the entry into the market of any Establishment or that may exclude it therefrom
- Restricting an Establishment's access to goods and services in the market, either in whole or in part
- Dividing a market or markets for the sale or purchase of goods and services, or allocating them on the basis of certain (stated) criteria
- Freezing or controlling manufacture, development, distribution and marketing operations and all other investment aspects
- Coordinating or engaging in collusive bidding or tendering in public tenders or in other anti-competitive practices

Article 6: Abuse of a Dominant Position

The New Law defines a dominant position as "a situation where an Establishment, or group of Establishments, dominate and/or influence a given percentage of the market in which it conducts its activity". Under the earlier Competition Law, a dominant position occurs if either:

- An entity or a group of entities has a market share of at least 40% of total sales of a good or service for a period of 12 months
- An entity or group of entities was able to affect the applied price in the market

Establishments with a dominant position in the market (or a significant part of it) must not abuse that position to either prejudice or control competition. There are seven specific examples of practices that are *de facto* considered as constituting such abuse:

1. Selling goods or services at a price lower than the total cost, in order to exclude Establishments from the market or to expose them to gross losses, or to obstruct the entry of potential Establishments into the market
2. Determining or imposing the sale price or terms of resale of goods or services
3. Decreasing or increasing the available supply of goods in order to control their price or to create a relative shortage or abundance in the market
4. Discriminating between Establishments of a similar nature with respect to the price of goods or services or the terms of sale or purchase
5. Refraining from dealing with another Establishment without an objective reason, in order to prevent it from entering the market
6. Prohibiting an Establishment from dealing with another Establishment
7. Requiring that the sale of goods or services be conditional upon assuming obligations or accepting goods or services that are, by their nature or commercial application, unrelated to the first mentioned goods or services

Article 7: An Economic Concentration

The New Law regulates economic concentrations. An economic concentration is defined as "any disposition which may result in the whole or partial transfer of ownership in assets, rights, shares, dividends or obligations from one Establishment to another, or the consolidation of two or more departments into a joint department" (an Economic Concentration). Any Establishment that is contemplating a transaction that may lead to an economic concentration must notify the General Authority at least 90 days prior to its consummation, where the aggregate annual turnover of the participating Establishments exceeds an amount that is to be specified in the Implementing Regulations.

The procedure for seeking the approval for a related transaction following notification to the General Authority is set out in Articles 9 thru 11.

Article 8: Exemption

The Board may upon request consider exempting an Establishment from the provisions of Articles 5, 6 and 7 of the New Law, if what is proposed may enhance the performance of the market or Establishments in terms of the quality of goods, or technical development or creativity, providing that the interests of consumers is promoted.

The interests of consumers is stated as ultimately outweighing the preservation of free competition.

Penalties

Article 19 and 20 provide for the following penalties upon breach:

- In respect of Articles 5, 6, 7 and 11 (Anti-competitive practices, Abuse of a Dominant Position, and unlawful Economic Concentrations), a fine not exceeding an amount equal to 10% of the total annual sales the subject matter of the violation, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR 10 million. The Settlement Committee (referred to below) may, at its discretion, elect instead to impose a fine not exceeding three times the profit generated by the offence. The quantum of fine may be doubled in the case of repeat offence.
- In respect of Article 16 (impeding investigation), a fine not exceeding an amount equal to 5% of total annual sales, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR 5 million. The quantum of fine may be doubled in the case of repeat offence.
- In respect of other breaches, a fine not exceeding SAR 2 million.

When imposing these and other penalties, the following shall be taken into account:

- If the Establishment is engaged in several activities where each activity differs from the other, any fine shall be assessed according to the nature of the activity the subject matter of the violation, taking into account the activities targeted by the violation
- The conditions and circumstances of the violation
- The gravity of the violation
- The effects of the violation

Settlement Committee

Under Article 18, an internal committee is constituted and charged with reviewing any alleged breach of the New Law and the Implementing Regulations (save for breaches committed by the General Authority or its personnel under Articles 12 and 24) and with the imposition of penalties if appropriate. Decisions of the Committee may be appealed to the competent court within 30 days of notification.

Private Claims

Without prejudice to penalties imposed pursuant to the New Law, private claims may under Article 25 be brought before a competent court by any natural or legal person who suffers a loss as a consequence of breach.

Conclusion

While the New Law and its Implementing Regulations are yet to come into force, establishments in the Saudi market should, without delay, assess their current arrangements, as well as all future conduct, to ensure compliance with the requirements and restrictions imposed thereunder.

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