SAUDI ARABIA

Law and Practice

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GLA & Company

Contents

GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Co-operation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE, it offers unique insights for companies seeking to establish or expand business operations in these nations. The firm's emphasis on deals is to get them cleared with the local competition authority and it has excellent relationships with regulators in the GCC. GLA has been successful in securing no objections from these bodies to clear deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments and committees on behalf of clients.

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Shahad Al-Humaidani serves as an associate at GLA & Company's Riyadh office, with a versatile background in both governmental and private sectors within Saudi Arabia. Her expertise is particularly focused on providing support to foreign companies aiming to establish a presence in the Kingdom of Saudi Arabia (KSA). In this capacity, she navigates the complexities of regulatory frameworks, including the Saudi Arabian General Investment Authority (MISA) and the Ministry of Commerce (MOC). Shahad's keen understanding of the legal landscape ensures the smooth entry of foreign entities into the KSA market, guaranteeing compliance with local regulations and facilitating successful business operations.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The key merger control legislation in Saudi Arabia comprises the following:

- Cabinet Resolution No 372 of 1440H promulgating the Kingdom of Saudi Arabia (KSA) Competition Law (Royal Decree No (M75) of 1440H) (the "KSA Competition Law").
- The KSA Competition Law is supplemented by the implementing regulations pursuant to Resolution No 337 of 25/1/1441H concerning the Executive Regulations of the KSA Competition Law ("Executive Regulations").

1.2 Legislation Relating to Particular Sectors

In terms of the legislation concerning particular sectors, there are the updated Merger Review Guidelines issued by the GAC (defined in **1.3 Enforcement Authorities**) in November 2023 ("Guidelines").

1.3 Enforcement Authorities

The KSA General Authority For Competition (GAC) enforces the relevant legislation.

2. Jurisdiction

2.1 Notification

Notification is compulsory with respect to any entity that is encompassed within the scope of the KSA Competition Law.

Exceptions:

- transactions that do not result in a change of control (eg, acquisition of minority interests with no veto rights over strategic decisions or internal restructuring within the same corporate group); and
- public institutions and state-owned companies if they are solely authorised by the government to supply goods or services in a certain field.

2.2 Failure to Notify

The KSA Competition Law provides for the following penalties upon breach.

- In respect of Articles 5, 6, 7, and 11 (Anticompetitive Practices, Abuse of a Dominant Position, and Unlawful Economic Concentrations), a fine not exceeding an amount equal to 10% of the total annual sales of the subject matter of the violation, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR10 million, may be imposed. The Settlement Committee (GAC committee charged with reviewing any alleged breaches of the KSA Competition Law and Executive Regulations, excluding Articles 12 and 24, and imposing penalties appropriately) may, at its discretion, elect instead to impose a fine not exceeding three times the profit generated by the offence. The amount of the fine may be doubled in the case of a 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 SAR5 million, may be applied. The value of the fine may be doubled in the case of a repeat offence.
- In respect of other breaches, a fine not exceeding SAR2 million may be enforced.

When the Settlement Committee imposes any of the aforementioned penalties, the following shall be taken into consideration.

- 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 of the subject matter of the violation, taking into account:
  (a) the activities targeted by the violation;
  (b) the conditions and circumstances of the violation;
  (c) the gravity of the violation; and
  (d) the effects of the violation.

With respect to penalties implemented, the GAC publishes the relevant performance review across all of its competencies. The latest report provided on the GAC's website is for year 2022. The report details that the GAC, since its inception, received 642 complaints in regard to violations of the KSA Competition Law to date (including 127 new complaints for 2022). Ultimately, the GAC proceeded with 22 new cases in total and decided to initiate investigation, research, and evidence-gathering. In 2022, an undisclosed number of final judgments were issued in favour of the GAC, in comparison to 21 judgments in 2021. Pursuant to Article 19 of the KSA Competition Law, the final judgments implemented against the violators shall be published at the expense of the violators. As such, the GAC published, in its 2022 annual report, tables of judgments issued in its favour, along with each issuer, the number of enterprises, the fine amounts, the violation types and the sectors each violator did business in. The top two violation types involved were categorised as "Collusion in tenders" and "abuse of dominant position". The total amount of collected fines collected was SAR90,566,313.70 for the year 2022 compared to SAR102.12 million in 2021.

On the economic concentration landscape, the GAC has issued its full year-round statistics of notifications for 2023 and the statistics for Q1 2024. The numbers showcase the amount of economic concentration notifications filed before the GAC, the amount of clearances by the GAC, the amount of no-notification-required decisions, and the amount of notifications under review, among other relevant information. On one hand, Q1 2024 saw 93 new economic concentration notifications submitted to the GAC, as opposed to a total of 313 notifications in 2023. The Q1 2024 notifications ended in 48 clearances, and 32 no-notification-required decisions with 13 notifications still under review. On the same track, the GAC's decisions were a total of 172 clearances, 128 no-notification-required decisions, and three conditional clearances with only ten notifications still under review by the end of 2023.

It should be noted that the percentage of the 2023 notifications were 83% acquisitions, and 14% joint ventures, followed by a low 2% of merger notifications, among others. Q1 2024 has a similar pattern seeing 71% acquisitions, and 21% of joint ventures, followed by a stable 2% of merger notifications, among others. Regarding economic concentrations involving foreign parties, 63% of the notifications involved foreign parties in Q1 2024, as opposed to a total of 64% of the notifications in 2023 (foreign-to-foreign and a foreign party included).

In terms of economic-concentration-related violations, the GAC has imposed its first fine, since October 2020, for failing to notify an economic concentration. This is the second time such a fine was imposed since the Competition Law was implemented. The fine was issued against Panda Retail Company and Atabat Al-Bab Telecom and Information Technology Company, as announced by the GAC.

The GAC, in a piece of media circulated by Talal Al Hogail, head of the GAC's M&A Department, stated that it undertook investigative efforts upon a decision by of the GAC Board of Directors, revealing that the parties to the transaction have indeed engaged in a notifiable economic concentration, and concluded its implementation without notifying the GAC, in violation of Article 7 of the Competition Law. Upon concluding that the Parties are indeed in violation of the Competition Law, the GAC has sanctioned each party with a financial fine of SAR400,000. This sanction is in line with the penalties prescribed under Article 19 of the Competition law for failure to notify an economic concentration.

2.3 Types of Transactions

The KSA Competition Law uses a principle of economic concentration to identify merger control issues. Economic concentration is defined as any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of a firm to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or any other form that leads to the control of an entity, including influencing its decision, the organisation of its administrative structure, or its voting system. This definition captures asset and share purchases, joint ventures, mergers, and takeovers.

Exceptions:

- 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.
- Public institutions and state-owned companies, if they are solely authorised by the government to supply goods or services in certain a field.

2.4 Definition of "Control"

While prior to the issuance of the Guidelines it remained unclear how the GAC would analyse 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.

It is now clear that transactions that do not result in a change of control (eg, acquisition of minority interests with no veto rights over strategic decisions or internal restructuring within the same corporate group) are within the scope of the KSA Competition Law and notice to the GAC is not required.

2.5 Jurisdictional Thresholds

Article 7 of the KSA Competition Law provides that the entities involved in the economic concentration must notify the concentration to the GAC if the total annual sales value of the entities seeking to participate in the economic concentration exceeds the amount determined by the Regulations.

Article 12 (1) of the Executive Regulations specifies that the concentration must be notified to the GAC if the total annual sales value of all entities intending to participate in the economic concentration exceeds SAR200 million. This requirement was established in accordance with the GAC's approved decision dated 23/08/1444H corresponding to 15/03/2023G, which increased the threshold from SAR100 million to SAR200 million.

Furthermore, the GAC Board of Directors, in its meeting No 84 dated 23 October 2023, announced new requirements for an economic concentration's eligibility for notification before the GAC, making KSA a minimum-threshold jurisdiction.

In addition to the financial threshold established by the Executive Regulations above, the parties must also fulfil the following.

- Target Entity Sales Threshold – of the Financial Threshold, the annual sales of the target entity (in and outside KSA) in an economic concentration must exceed SAR40 million.
- Local Sales Threshold – the combined total sales realised locally (within the territory of the Kingdom of Saudi Arabia (KSA)) by the parties to the economic concentration must exceed SAR40 million.

Article 12 (2) of the Executive Regulations also provides that where it is impossible to estimate the annual sales value of the entities, or where the entities' business activities do not extend for a full fiscal year, then the annual sales value for the whole year shall be estimated based on the firms' activity, as the case may be.

2.6 Calculations of Jurisdictional Thresholds

Threshold and Calculation

The KSA Competition Law bases the notification threshold on "the total annual sales value of the entities seeking to participate in the economic concentration".

Total annual sales value

- In most cases, the "total annual sales value" will be the total gross revenues of the relevant entity. These are the amounts obtained by the entity from the sale of products and services falling within the entity's ordinary business and related activities. For most entities that have financial statements prepared under the standards of the Saudi Organisation for Certified Public Accountants (SOCPA) or the equivalent prevailing accounting standards in the relevant entity's place of incorporation, the annual sales will be the entity's revenue appearing in the entity's income statement, as reflected in the entity's most recent audited financial statement. Where the entity is not required to produce audited financial statements, the annual sales will be the entity's revenue appearing in its most recent annual statement of income and expenses regularly prepared in accordance with the SOCPA standards or the equivalent accounting principles adopted by the entity, as the case may be.
- In the event that the relevant undertaking is an individual or a natural person, the GAC will in general apply the same principles to determine the relevant annual sales of the individual. The individual's annual sales will generally be their annual revenue amounts obtained from their ordinary business activities. The GAC will determine this on a case-by-case basis within the context of these general principles.
- However, where the entity's total sales incorporate sales rebates subsequently provided to its customers, the value of the sales rebates may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.
- In addition, where the entity's total sales revenues incorporate the amount of value-added taxes and other taxes directly related to sales, the value of such taxes may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.
- Lastly, the KSA Competition Law does not distinguish between sales taking place within

the KSA and those taking place outside the KSA. Accordingly, the GAC will consider the relevant annual sales figures to be the combined aggregate group-wide and worldwide sales figures of all the relevant entities.

Currency

If the entity's financial statements are presented in a foreign (other than KSA) currency, then the annual gross revenues should be converted to values in Saudi Arabian riyals according to the average over the relevant financial year of the foreign exchange rate quoted by the Saudi Central Bank.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Please see **2.8 Foreign-to-Foreign Transactions**.

The KSA Competition Law specifies "all the entities participating in the concentration" and does not distinguish between acquiring and selling an entity or between mergers and acquisitions. The KSA Competition Law therefore requires that the notification threshold considers the total sales of all entities participating in the concentration without distinction or exclusion.

The GAC considers that the entities "participating" in the concentration are all those that form part of the newly concentrated entity after the economic concentration transaction has been completed. This means that where:

- two or more entities merge, the relevant entities are the merging entities in their entirety;
- one entity acquires another entity, the relevant concentrated entities are the entire entity that is acquiring the other entity, and the entity being acquired, but not the entity that is selling the entity being acquired;
- one entity acquires a part of another entity's operations, for example through purchasing a subsidiary or operational division, the relevant entities are:
  (a) the entire entity which is acquiring the operations or division; and
  (b) the operations or division it is acquiring, but not the entity which is selling the operations or division. This is because the acquiring entity and the target operations or division generally form/s part of (and are therefore participating in) the economic concentration, but the selling entity generally does not form part of the economic concentration; and
- two or more entities together participate in a full-function joint venture, the relevant entities for the notification threshold are all the entities acquiring joint control of the joint venture in addition to the joint venture itself. This principle applies both to newly formed joint ventures and to the acquisition of joint control of pre-existing entities.

Group of Companies

Two or more legal entities will be considered to form part of the same economic entity if they constitute a "single economic entity". The primary criterion in determining whether different legal entities form part of a single economic entity is "control". If one legal entity controls other legal entities (such as subsidiaries), either directly or indirectly, then for the purposes of determining the total annual sales values of the entity, the relevant single economic entity will include the controlling entity and all of the entities it controls. If a single economic entity consists of two or more legal entities, and each of those legal entities prepares accounts, then the total sales of the single economic entity for the purposes of calculating the notification thresholds are the total combined gross sales revenues of all of the entities. A group will therefore include all companies that have direct or indirect control-based links with the entity concerned, including its subsidiaries, but also including its parent company(ies) and any other companies within the parent company's group.

Exception

The single economic entity's revenues will exclude revenues resulting from transactions between the different legal entities within the group. Such intra-group transactions are not considered to be sales of the single economic entity.

2.8 Foreign-to-Foreign Transactions

The KSA Competition Law applies to all undertakings inside the KSA. It also applies to undertakings outside the KSA where those undertakings' activities, including any economic concentration, may have an affect on a market in the KSA. Article 3 of the Executive Regulations further provides that the GAC may assess the effect, actual or potential, of such conduct outside the KSA on a market inside the Kingdom.

Nexus Test

- The GAC will require economic concentrations taking place outside the KSA to be notified where there is a sufficient nexus between the economic concentration and a market inside the KSA. Pursuant to the KSA Competition Law and the Executive Regulations, this nexus is established where the foreign conduct (including economic concentrations among foreign undertakings) may have an effect on a market inside the KSA.
- The GAC will consider that there is sufficient influence on a market in the KSA where that potential result is direct, substantial, and reasonably foreseeable.
- Such economic concentrations among foreign undertakings are subject to Article 7 of the KSA Competition Law and must, therefore, in general be notified if the other relevant criteria for required notification are also fulfilled.
- The GAC will generally not consider there to be sufficient impact on the KSA market where the foreign conduct (including economic concentrations) does not meet these criteria. For clarity, a direct effect is not limited to direct sales and may take place by way of indirect sales (eg, sales by way of a distributor).
- The GAC will also look at whether the actual or potential effect on competition is substantial. This requires that the effect takes place within a market in the KSA. The GAC considers that this test will generally mean that jurisdiction is established where the actual or potential effect of the conduct on a market inside the KSA is more than trivial.
- Furthermore, the GAC will look at whether the potential effects on a market are reasonably foreseeable. In the general case, this will mean that the effect of the foreign conduct (including an economic concentration) can be reasonably foreseen and is more than merely speculative.
- In general, the GAC will consider it to be sufficient to establish a nexus if one or more of the foreign undertakings has sales in the KSA. However, sales in the KSA are not necessary to establish a sufficient nexus with a market in the KSA.

2.9 Market Share Jurisdictional Threshold

The GAC will consider market shares and market concentration in the context of the other relevant factors that it may consider in order to conclude if a market concentration will take place. The GAC typically measures market concentration using market shares, market concentration ratios, and the Herfindahl-Hirschman Index (HHI). The 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 HHI therefore requires the market shares, or estimates of them, for all the participants in the relevant market.

The GAC will generally use the following HHI thresholds to undertake a preliminary assessment of the potential competition effects of an economic concentration.

- The GAC is unlikely to identify horizontal competition concerns in an economic concentration in a market with a post-concentration HHI below 1,000. Such an economic concentration generally does not require extensive further analysis.
- The GAC is unlikely to identify horizontal competition concerns in an economic concentration with a post-concentration HHI between 1,000 and 2,000 and an HHI delta below 250, or an economic concentration with a post-concentration HHI above 2,000 and an HHI delta below 150, except where special circumstances that require additional competition analysis are present.

2.10 Joint Ventures

The KSA Competition Law uses the principle of economic concentration to assess merger control issues. A joint venture will constitute an "economic concentration" when "the joint venture forms an autonomous economic undertaking, or performs the economic functions of an autonomous economic undertaking, on a lasting basis". This would be considered a "full-function joint venture". The GAC will decide whether a joint venture would be considered a full-function joint venture on a case-by-case basis. Attributes of a full-function joint venture include the following.

- The joint venture must operate in a market and perform the functions normally carried out by a commercial undertaking operating in that market.
- The joint venture must ordinarily have a management team dedicated to its day-to-day operations and access to sufficient resources, including finance, staff, and assets (tangible and intangible), in order to conduct, on a lasting basis, its business activities within the area provided for in the joint-venture agreement.
- It must be intended to operate for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned (the joint-venture resources would be indicative, on this point).
- It will ordinarily have sufficient autonomy from its parent undertakings, in terms of its operational decision-making, to be considered a full-function joint venture.

A joint venture may begin its life as a non-full-function joint venture and subsequently becomes a full-function joint venture. It will, at that time, be considered as a new economic concentration requiring notification. Such a change in the nature of the joint venture can include the following.

- The joint venture's activities are enlarged during its lifetime, such as commencement of commercial sales to third parties in an open market.
- Enlargement of the joint venture, such as through acquisition by the joint venture of the

whole or part of another undertaking from the parent undertakings.
- The parent undertakings transfer significant additional assets, contracts, know-how, or other rights to the joint venture, where this transfer would constitute or enable an extension of the joint venture's activities, products, or geographic markets that were not the object of the original joint venture.
- A change in the organisational structure of the joint venture.

Changes in the nature of the joint venture are considered to have taken place upon the shareholder/s or the joint venture's management taking the relevant decision that led to the joint venture becoming a full-function joint venture, or from when the relevant activity commenced.

2.11 Power of Authorities to Investigate a Transaction

The GAC has no authority to investigate a transaction that does not meet the jurisdictional thresholds expressed under the KSA Competition Law and Executive Regulations.

2.12 Requirement for Clearance Before Implementation

The Competition Law provides that the undertakings participating in the economic concentration (or transaction) may not complete the transaction unless notified by the GAC of its approval in writing, or if 90 days have elapsed since the review period by the GAC commenced and it has not provided an approval or rejection.

The 90-day regulatory review period will begin on the date on which the GAC notifies the applicant that the notification submission is complete. If the last day of this regulatory review period corresponds to an official holiday, the next working day thereafter shall be considered the last day of this regulatory review period.

The regulatory review period may be suspended under certain circumstances.

- When the GAC requests any information or documents from the applicants, it may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents.
- When the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

Where the regulatory review period is suspended, the days during which it is suspended are not counted as part of the 90-day regulatory review period.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Where an economic concentration must be notified to the GAC, it is a violation of the KSA Competition Law for the transaction to be completed unless the participating parties have received the GAC's approval in writing. Refer to **2.12 Requirement for Clearance Before Implementation**.

See **2.2 Failure to Notify** with respect to the penalties implemented and their publication. The GAC's 2022 annual report (most recent report here) does not indicate that any of the penalties imposed were with respect to parties who have implemented the transaction prior to the GAC's clearance.

2.14 Exceptions to Suspensive Effect

Exemption

- The GAC's board of directors has the authority, pursuant to Article 8 of the KSA Competition Law and Chapter 7 of the Executive Regulations, to provide a party or parties with an exemption that would exclude the KSA Competition Law from being applied to a specific transaction or economic concentration. The exemption will be granted if it would lead to improved market performance or improve the performance of undertakings in terms of the quality of the product, or technological development, creative efficiency, or both. The benefit of such exemption to the consumer should outweigh the effects of restricting the freedom of competition.
- An application for exemption under this mechanism must be made and will be considered by the GAC if the application:
  - (a) is made in the format and on the forms specified under the Executive Regulations;
  - (b) provides adequate justification for the application;
  - (c) includes sufficient evidence of the positive results envisaged from the economic concentration; and
  - (d) provides supporting documents and any other information that the GAC requires to review the application.
- The board may, upon the recommendation of the technical committee, approve the application if the exemption would:
  - (a) lead to improving the market or undertakings' performance in terms of quality, diversification, technological development, or innovative efficiency;
  - (b) benefit consumers to a degree that outweighs the negative effects from the restriction of competition; and
  - (c) does not enable the undertaking(s) benefiting from the exemptions to exclude competition or competitors from any market.

All three conditions must be met for an exemption application to be approved. In addition to these conditions, the board may also consider any other factor relevant to assessing the degree of restriction of competition, along with the benefits, resulting from the exemption.

Failing Firm

- While the GAC does not provide for a waiver or exemption for a failing firm under the KSA Competition Law, it does take this aspect into consideration in its assessment. Where one of the economic concentration parties is a failing firm, the GAC may decide that an economic concentration which would otherwise cause competition problems may nonetheless be approved if the failing firm would be likely to exit the market even if the economic concentration does not take place.
- The basic requirement for a "failing firm defence" is that the deterioration of the competitive structure that follows the economic concentration would take place with or without the economic concentration and therefore cannot be said to be caused by the economic concentration.
- The GAC will generally only consider a "failing firm defence" to be appropriate if the economic concentration parties can demonstrate all three of the following criteria:
  - (a) that it is highly likely or inevitable that the allegedly failing undertaking would, in the near future, be forced to exit the market because of financial difficulties if it is not taken over by another undertaking;
  - (b) that the assets of the failing firm would also be highly likely or inevitable to exit

the market if they do not participate in an economic concentration; and

(c) that there is no less anti-competitive alternative purchase or other alternative to the notified economic concentration.

- The onus is on the relevant parties to provide the GAC, in due course, with the "failing firm defence", with all the relevant information necessary to demonstrate as such.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no circumstances where the authorities will permit closing before clearance or an exemption. It may be possible to carve out the businesses or assets in the KSA and implement global closing to the extent the closing does not have a sufficient affect (see **2.8 Foreign-to-Foreign Transactions**) on the KSA market. GAC approval may be required.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

With respect to the required notification in the event the KSA Competition Law and Executive Regulations are applicable to a specific economic concentration, the relevant participants must notify the GAC 90 days before completion of the economic concentration.

Refer to **2.2 Failure to Notify** with respect to penalties and their imposition.

3.2 Type of Agreement Required Prior to Notification

As part of the initial application for notification to the GAC, the applicant must also provide a finalised, duly executed agreement to carry out the economic concentration, stating the nature of the transaction and a description of the shares, equity, assets, rights, or obligations to be purchased or transferred, or managements to be joined, between the relevant entities. The GAC requires these documents for valid notification. If notification is made without all the requisite documents being provided, the GAC reserves the right to close the notification file.

3.3 Filing Fees

The fee to be paid for examining the economic concentration (the "notification fee") is 0.0002 times (0.02% of) the total annual sales value of undertakings intending to participate in the economic concentration, with an upper limit of SAR250,000. The parties must pay the notification fee before submission of the notification and must submit proof of payment of the notification fee along with the other notification documents and information. The GAC requires this proof of payment before the notification will be considered to be complete.

3.4 Parties Responsible for Filing

The parties intending to participate in the economic concentration transaction must notify the GAC of the transaction. Notice of the transaction may be provided by the parties' legal representative. A failure by the concentration parties to submit a notification does not preclude the GAC from initiating a review and assessment of the economic concentration either prior to or after the completion of the transaction.

3.5 Information Included in a Filing

The notification should in general be completed in the Arabic language. Notifying parties may choose to complete the forms in the English language but this must be accompanied by a translation into Arabic.

When submitting the notification, the applicant should submit the following information and documents:

- the duly completed notification form, including the declaration as to the validity and accuracy of the information contained in the notification;
- relevant identification documents of the person submitting the notification;
- attach the required parties' documents (explained below);
- proof of payment of the prescribed fees for examining the economic concentration;
- the finalised, duly executed agreement to carry out the economic concentration, stating the nature of the transaction and a description of the shares, equity, assets, rights, or obligations to be purchased or transferred, or managements to be joined, between the relevant entities;
- a report that describes the economic impact of the transaction on the relevant markets ("Economic Report"), and this report should include a detailed description of the following items:
  (a) the economic concentration transaction and the participating parties;
  (b) the relevant sectors and markets in which the economic concentration may have an affect;
  (c) the key customers of the participating parties in those sectors and markets;
  (d) the key competitors of the participating parties in those sectors and markets; and
  (e) the potential impact of the economic concentration transaction on competition in those sectors and markets – the GAC can discuss with the notifying parties the contents of such an Economic Report, and provide a brief template, upon request, plus any other data, information, or documents required by the GAC to review the economic concentration; and
- a full explanation of the above submitted documents.

For the acquiring entity/merging entity/first partner in the joint venture:

- validated Power of Attorney (POA) by the Ministry of Justice/KSA Embassy/KSA Consulate/Apostilled;
- articles of association;
- commercial register; and
- financial statements for last financial year (LFY).

For the target entity/merged entity/second partner in the joint venture:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate/Apostilled;
- articles of association;
- commercial register; and
- financial statements for LFY.

For the seller:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate/Apostilled;
- commercial register; and
- the official contact persons for the economic concentration parties and any relevant third parties are specified in the submission.

3.6 Penalties/Consequences of Incomplete Notification

If notification is made without all the requisite documents being provided, the GAC reserves the right to close the notification file. The GAC's annual reports for 2022, 2021, 2020 and 2019 reveal that only one application was rejected in 2021 due to an incomplete notification application. This is in contrast to the years 2020 and 2019, when there were no rejected applications. However, in 2022, one application was rejected due to potential efficiencies from the transaction involved in the concentration parties' view, which could be realised without the transaction consummating. Additionally, it was determined that the potential harms to competition outweighed the expected benefits if the transaction were completed.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Pursuant to Article 49 of the Executive Regulations, if the notifying party is found to have withheld information, provided misleading information, or concealed or destroyed documents that are useful in the GAC's investigation, they would be punished by a fine not exceeding 5% of the total annual sales turnover or not exceeding SAR5 million when it is impossible to estimate the annual sales.

3.8 Review Process

The economic concentration must be notified to the GAC at least 90 days prior to the completion of the economic concentration. The applicant's notification submission will be considered to be complete when the applicant has satisfied the required conditions for notification, including providing the required information and documents necessary for complete notification. The 90-day regulatory review period will begin on the date on which the GAC informs the applicant that the their notification submission is complete.

The regulatory review period may be suspended when:

- the GAC requests any information or documents from the applicants – it may suspend the regulatory review period from the date when it requests the information or documents, to the date when the applicant provides the requested information or documents; or
- the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

A case team will be appointed to conduct a review and investigation into the economic concentration, within the 90-day period. Once the case team has completed its review, it will submit a detailed note outlining its opinion for the GAC's board of directors. The board will evaluate the case team's opinion, taking into account all relevant factors and its objectives under the KSA Competition Law and Executive Regulations. The board will issue a decision in one of the following three ways:

- approval of the economic concentration application;
- refusal of the economic concentration application, where such decision will be accompanied by a statement of reasons; or
- approval of the economic concentration, subject to conditions determined by the board, where such decision will be accompanied by a statement of reasons.

3.9 Pre-notification Discussions With Authorities

The GAC is generally available for discussions with parties or their representatives prior to the formal notification of an economic concentration transaction.

Pre-notification discussions are entirely voluntary and at the parties' discretion. The GAC will not conduct pre-notification discussions on a hypothetical basis or without knowing the identities of the parties and markets at issue. To request a pre-notification discussion, the parties or their representatives should provide the following information to the GAC:

- the names and contact information of the economic concentration parties and their representatives (if any);
- the type of transaction;
- the markets or goods and services affected by the proposed transaction; and
- the possible impact of the transaction on competition in general terms.

It is generally recommended that this information be provided in the form of a brief confidential memorandum to the GAC as this will assist the efficiency of the pre-notification process.

Pre-notification discussions are encouraged by the GAC and treated as strictly confidential.

3.10 Requests for Information During the Review Process

The information requested during the review process includes:

- documents, records, data, files, specific written information, and other information that the GAC considers relevant for its review of the transaction;
- such information from other parties, including from competitors, other stakeholders, and the general public;
- the GAC may similarly accept information that has been offered voluntarily by other parties; and
- the GAC may require any of the economic concentration parties or other parties to provide it with market information to evaluate the effects of the economic concentration on competition.

Written Requests

- A request for information will ordinarily take place by way of a written request for information addressed to the relevant parties or their nominated representatives. The written request for information will state the purpose of the request, specify what information is required, and specify the time limit within which the information is to be provided.
- A written request for information may cover all types of information helpful to the case team in assessing the transaction, including, but not limited to, written responses to specific questions, data and statistics, economic studies and market surveys, the parties' internal documents such as strategic plans, strategic analyses of corporate markets, pricing policies, business plans, marketing plans, long- and short-term forecasts, a list of major customers, information about competitors, marketing and sales reports, sales and bidding data, excess capacities data, production costs, and any other documents and data that the GAC deems to be necessary for its assessment of the intended economic concentration.

Meetings and Interviews

The GAC may also gather information by holding meetings and direct interviews with the concentration parties or third parties. The GAC may communicate by phone with any of the representatives or affiliates of the concentration parties, and request any information required for the review of economic concentrations at any stage of the review process, when necessary.

Information that may be sought by way of phone communications or meetings may include the following:

- basic or summary information that is required without delay;
- verification of specific claims submitted by one of the concentration parties or third parties;
- identification of specific individuals who can provide evidence; and
- any other information that may appropriately be sought in this way.

The 90-day regulatory review period may be suspended under certain circumstances:

- when the GAC requests any information or documents from the applicants, it may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents; and
- when the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

3.11 Accelerated Procedure

There is no indication that there is an option for an accelerated procedure under the applicable law or GAC regulations.

4. Substance of the Review

4.1 Substantive Test

The substantive test employed by the GAC pursuant to the KSA Competition Law and Executive Regulations is whether there is an economic concentration (as defined under the KSA Competition Law) that causes a sufficient impact on the KSA market and lessens competition. Further, the GAC considers change of control to be directly correlated with an economic concentration taking place.

4.2 Markets Affected by a Transaction

When assessing whether an economic concentration substantially lessens competition, the GAC will examine the competitive impact of the transaction in the context of the markets relevant to the economic concentration.

In defining markets in their product and geographic dimensions, the GAC focuses on two key dimensions of substitution.

- The product dimension – substitution between products is a central concept in defining the product dimension of markets. The GAC notes that "product" in this context includes goods, services, and other equivalent economic outputs.
- The geographic dimension – substitution between different locations of the relevant goods or services is a central concept in defining the geographic dimension of markets. The GAC notes that the "geographic dimension" in this context may be local, regional, national, or wider, including worldwide.

When defining markets, the GAC will in most cases follow a general approach.

- First, the products and geographic regions actually or potentially supplied by the economic concentration parties will be identified. This is the first step in identifying the markets that may be relevant in the analysis of the economic concentration. In this way,

the GAC begins by considering those areas of activity where competitive harm may occur, by considering in each case the products and geographic regions where there may be an overlap between the activity of the economic concentration parties, or some other meaningful economic relationship such as an actual or potential vertical relationship. This is done on a case-by-case basis. In many cases, more than one potential market may be identified.
- The GAC then considers the boundaries of those potential markets in their product and geographic dimensions. A properly defined relevant market includes all those products and geographic regions that are sufficiently close substitutes of the products and geographic regions first considered.

Further to the above, there are specific factors enumerated in the Executive Regulations that the GAC may pass within its overall objectives of protecting and promoting competition within a market. These are as follows:

- Structures of relevant markets and the level of actual or potential competition between undertakings inside the KSA or abroad, in cases where it has an impact on local markets.
- Financial positions of the parties to an economic concentration.
- Commodity alternatives that are available to consumers, vendors, and clients, and how accessible such alternatives are.
- Level of product differentiation.
- Consumer interests and welfare.
- Potential impact of the economic concentration on prices, quality, diversification, innovation, or development in a relevant market.
- Actual or potential harm or benefits to competition from the economic concentration transaction.
- Supply and demand growth and trends in the relevant market and commodities.
- Barriers to entry or exit of new undertakings into a relevant market, their continuation therein, or expansion, including regulatory barriers.
- The extent to which an economic concentration may create or strengthen a significant market power or a dominant position of an undertaking – or group of undertakings – in any relevant market.
- The level and historical trends of anti-competitive practices in a relevant market, either for the parties to an economic concentration or the undertakings influential in such market.
- Views of the public, economic concentration-related parties, and sector regulators.

Dominance in a relevant market can be demonstrated if one or both of the following criteria are achieved.

- A market share of 40% or more of the relevant market – whether it is the share of a single firm or a group of firms, whenever that group acts with a common will in committing the violation or causing the effect.
- Ability to influence a relevant market such as controlling prices, production, or demand – whether it is the ability of a single firm or a group of firms, whenever that group acts with a common will in committing the violation or causing the effect.

4.3 Reliance on Case Law

There is no indication of the GAC relying on case law with respect to issues such as market definitions from other jurisdictions.

4.4 Competition Concerns

The GAC will broadly consider the following three categories of economic concentration.

- Horizontal concentrations – these involve concentrations of (actual or potential) suppliers of substitutable goods or services, typically operating on the same or a comparable functional level of the supply chain, and therefore commonly a concentration of competitors in the same market.
- Vertical concentrations – these involve undertakings operating (or potentially operating) at different functional levels of the same vertical supply chain, commonly where the output in one market is an input into production in the other market, and are therefore commonly not in direct competition with each other in any market.
- Conglomerate concentrations – these involve undertakings that operate (or potentially operate) in different markets and without being in the same vertical supply chain, but supply goods or services that are in some way related to each other; eg, products that are complements for consumers or in production.

4.5 Economic Efficiencies

The GAC assesses the effect of economic concentrations on competition, competitive constraints, and the efficiency of markets, rather than on the efficiency of individual entities.

The consideration of efficiencies is relevant to the competition assessment if, and only if, the efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services, in which case the conclusion may be that the economic concentration may not substantially lessen competition.

For the GAC to take account of efficiency claims in its assessment of an economic concentration and to be in a position to reach the conclusion that, as a consequence of efficiencies, the economic concentration is unlikely to substantially lessen competition, the efficiencies have to:

- benefit consumers;
- be specific to the economic concentration; and
- be verifiable.

All of these conditions must be satisfied for the GAC to consider efficiencies in the context of its competitive assessment of economic concentrations.

4.6 Non-competition Issues

There is no express limitation or permission on what the GAC can take into account to achieve the objectives of the KSA Competition Law and Executive Regulations.

The KSA has a standalone law with respect to foreign investments that seems to be separate from the KSA Competition Law.

4.7 Special Consideration for Joint Ventures

See **2.10 Joint Ventures**.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

To the extent the transaction creates an economic concentration that sufficiently impacts the KSA market, the GAC board has the authority to reject the notification filing and block the transaction from taking place or require conditions for the transaction to proceed. The GAC has this authority pursuant to the KSA Competition Law and Executive Regulations.

5.2 Parties' Ability to Negotiate Remedies

The parties may propose structural or behavioural remedies.

In most cases, remedies are proposed by the economic concentration parties, at their discretion, as a means of permitting a transaction to be approved subject to conditions rather than the transaction being blocked altogether. In principle, the structure and content of the remedies offered to the GAC will therefore be a matter for the party offering the remedies. However, the GAC will only accept remedies as conditions if it is satisfied that they address the GAC's competition concerns to a degree sufficient to allow the GAC to approve the transaction subject to those conditions. The GAC will generally provide detailed feedback on the form and content of remedies proposed by the parties, including regarding whether the GAC would be satisfied that they would alleviate the competition concerns sufficiently, and, if not, what amendments to the proposed remedies would be required for the GAC to accept them.

Economic concentration parties therefore have strong incentives to propose effective and enforceable remedies to the GAC to alleviate the identified competition concerns.

5.3 Legal Standard

There is no specifically expressed legal standard for remedies. An acceptable remedy must adequately address and alleviate the potential competition harm created by the specific economic concentration.

5.4 Negotiating Remedies With Authorities

Economic concentration parties are free to propose remedies to the GAC at any time throughout the transaction review process, including at the outset of the review, the pre-notification phase, the moment of first notification, and after the economic concentration parties have been advised of potential competition concerns during a review. In general, economic concentration parties are encouraged to begin discussions with the GAC as early in the process as possible.

When an economic concentration raises competition issues at the outset or during a review, the economic concentration parties may decide to offer remedies to the GAC. If the GAC accepts that the remedies are sufficient to address the competition concerns in that case, the GAC may decide to approve the economic concentration subject to the condition that the remedies be implemented, rather than blocking the economic concentration.

5.5 Conditions and Timing for Divestitures

A divestiture remedy will normally specify the following key elements:

- the scope of the divestiture package, such as the assets or businesses (or parts of businesses) to be disposed;
- the process for selecting a purchaser; and
- the process for the disposal, including the required timeline for the disposal.

Parties may not complete a transaction before remedies are complied with.

The GAC maintains a role in relation to remedies and conditions accepted with respect to economic concentrations, including:

- monitoring parties' compliance with commitments; and
- investigating suspected breaches and enforcing remedies and conditions, including by legal action where appropriate.

Non-compliance or breach of an agreed remedy is a violation of the KSA Competition Law.

- Where the economic concentration parties commit a breach of an obligation under the conditions, the GAC may revoke its approval decision. In some cases, such as where a required divestiture is not made within the required timeframe, the GAC's decision to approve the economic concentration subject to the conditions may lapse on the basis that the required condition was not fulfilled. This, and comparable breaches of the conditions, may subject the economic concentration parties to fines under Article 19 of the KSA Competition Law.
- The economic concentration parties may also be subject to fines under Article 20 of the KSA Competition Law, and other measures under Article 21 of the KSA Competition Law, including requiring the economic concentration parties to unwind the economic concentration. Furthermore, the GAC will also take into account all other relevant provisions of the KSA Competition Law and the Executive Regulations in setting fines and other measures, including but not limited to Article 22 of the KSA Competition Law and Chapter 7 of the Executive Regulations.

5.6 Issuance of Decisions

A formal decision permitting or prohibiting a transaction may be issued to the party by the GAC. In the event that the investigation period of 90 days elapses without the issuance of a decision by the GAC, then it would be considered an approval pursuant to the KSA Competition Law. The application decisions are made public (as a statistic in the GAC annual report); however, the party names are not mentioned unless they are penalised.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The firm is not aware of the GAC having required remedies or prohibited foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Clearance decisions will only cover competition issues.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Relevant third parties could be involved in the review process by the applicant including them in the application submission, or by the GAC requiring their input. The third parties have a right to request an interview or make a claim as part of a specific investigation for economic concentration. The GAC may elicit information from third parties by conducting a survey.

The case team may discuss its interim assessment with third parties in order to identify and to seek to resolve any unresolved issues. The team may present its assessment or a part thereof to third parties for their opinions, while taking into account the need to obtain objective, impartial, and substantiated opinions.

The third parties' interests in confidentiality will be preserved throughout the assessment and investigation process. No documents of the third parties will be shared with others, except pursuant to the procedures outlined in the guidelines. Where a GAC document to be released during interim consultations contains information that is confidential to a third party, the GAC will prepare a public version of that document which redacts any such confidential information. The parties whose confidential information is to be redacted will be given an opportunity to comment on this redaction.

7.2 Contacting Third Parties

See **7.1 Third-Party Rights**.

7.3 Confidentiality

The KSA Competition Law provides that the members of the board of directors and the employees of the GAC must maintain the confidentiality of information, records, data, files, and documents (together, "information") obtained from the economic concentration parties or other entities in the course of collecting evidence or investigations. Such information may not be passed to other parties except with the approval of the board, where the board's approval has been recorded in the meeting minutes, or with the approval of the Governor in the following cases:

- with the consent of the party providing the information;
- for submission of the information to judicial and quasi-judicial bodies; or
- for the purposes of the exchange of views and opinions with international competition authorities concerned with the review process, where the economic concentration parties have been notified of the GAC's intention to disclose the information, and provided that the international competition authority receiving the information shall take the necessary legal measures for the protection of the confidentiality of the information.

7.4 Co-operation With Other Jurisdictions

Where an economic concentration is also being reviewed by competition authorities in other countries, including in cases where the possibility of remedies has also been raised in those other countries, the GAC will seek, where possible and reasonable, to consult and co-ordinate with those foreign competition authorities. This consultation and co-ordination is for the purpose of seeking consistency where this is feasible and appropriate, including in relation to remedies.

Where appropriate, the GAC will seek confidentiality waivers from economic concentration parties that allow the GAC to exchange confidential information relating to the economic concentration with the relevant overseas competition authorities. The GAC expects economic concentration parties to give it the same notice of economic concentrations and any potential remedies offered as the parties give to the overseas competition authorities, and normally requires simultaneous lodgement of submissions with the GAC and overseas competition authorities.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The parties have 30 days from the date of notification or from the date specified for delivering the decision to the parties of the case, even if they failed to appear, to appeal the GAC's decision to the Riyadh Administrative Court of Appeal, otherwise it will become final.

If one of the parties appeals the GAC's decision before the Riyadh Administrative Court of Appeal, that party must notify the GAC within three working days from the date of appeal, by means of a letter containing the GAC's decision number and date, and the number and date of the appeal filed with the Riyadh Administrative Court of Appeal and a copy thereof.

8.2 Typical Timeline for Appeals

No statistics have been released with respect to successful or unsuccessful appeals against the GAC.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The authors are not aware of any third-party appeals of GAC decisions as of yet.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Generally, any company registered to do business in the KSA, and thereafter entered onto the transaction involving the entering or exiting of shareholders, would need to file the proper documentation reflecting the change in the company commercial registry. For clarity, the Ministry of Investment in the KSA should be notified in the event that there is a change in ownership within a company. Otherwise, there is no specific filing required with respect to foreign direct investment or foreign subsidies.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

See **2.5 Jurisdictional Thresholds** and **3.3 Filing Fees**.

10.2 Recent Enforcement Record

See **2.2 Failure to Notify**.

10.3 Current Competition Concerns

The latest GAC annual report is from 2022 and the Authority has yet to publish the 2023 report. As such, there is no current information from the GAC in this regard.