

The Egyptian Competition Authority: A New Approach in Light of a New Economic Strategy

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Today Egypt is experiencing a critical transitional phase in its economic history. The Egyptian government is seeking to promote market security and best international business practices. Several administrative bodies are collaborating to execute the same economic strategy, aiming at attracting national and foreign investors. In order to establish this strategy, the political leadership realised that free competition in the market is key. Competition encourages innovation and production efficiency as well as simultaneously helping to promote consumer welfare through inter-firm rivalry.

However, because fierce rivalry may possibly lead to anti-competitive practices, the competition authority should play an integral role in ensuring that economic activities are properly carried out and free and fair competition in the marketplace are safeguarded.

The Egyptian Competition Authority ('ECA') was created by virtue of Law No. 3 of 2005 regarding the Protection of Competition and Prohibition of Monopolistic Practices (the Egyptian Competition Law ('ECL')) as an independent body affiliated with the Prime Minister. The ECA is mandated to act as the administrative body responsible for safeguarding a climate in which competitors have equal opportunities to compete in all economic sectors.

The ECL was amended several times by Law No.190/2008, Law No. 193/2008, and Law No. 56/2014

granting the ECA additional powers to investigate anti-competitive practices. A Mergers and Acquisitions ('M&A') control is yet to be introduced and debate is still ongoing regarding further proposed amendments to the ECL.

The Country's New Economic Strategy

The new strategy focuses predominantly on the economy. Saying that competition is key, the actual presidential speeches, as well as a number of ministerial interventions consistently refer to the ECL and the ECA's role of safeguarding market stability as one of the main factors in achieving the new economic strategy. The country's new economic strategy confirms that the ECL's aim should be to focus on the behaviour of those doing business in the market, and not restrict growth or development.

Recent years show an effective and determined enforcement policy from the ECA, which is a reflection of the country's new economic strategy. The ECA continues to pursue its strategic mission, being the key instrument for ensuring free competition in the market whilst prohibiting anti-competitive practices, serving a healthy business environment with a view to enhancing the efficiency of the national economy.

The following points demonstrate the enforcement policy focused on markets of major strategic importance for both the consumers and the overall economy. The ECA enforcement strategy covers different aspects including: cartels; abuse of dominance; and M&A control. The ECL recognises all types of anti-competitive agreements and practices. The ECL deals with hardcore cartels (Article 6), with vertical agreements that restrain or limit competition in the market (Article 7) as well as abuse of dominant position in the marketplace (Article 8).

Cartels

Article 6 of the ECL provides an exhaustive list of the prohibited agreements between competitors in any relevant market. This list includes the following;

1. price fixing;
2. market allocation;
3. collusive tendering or bid-rigging and;
4. limitation on production or distribution of products.

The ECL adopted a per se approach in cartel cases whereby the agreement itself is considered in breach of the law regardless of its effect.

In 2014, the ECL was amended to introduce a pre-exemption mechanism to cartel agreements in case an agreement leads to achieving economic efficiency, provided that the benefits to the consumer outweigh the restriction of competition.

It is worth mentioning that anti-competitive practices, including cartels, are of a criminal nature and are subject to fines that are decided by a criminal court judge. According to Article 22.1 of the ECL, cartel violations are subject to fines ranging between a minimum of 2 percent and a maximum of 12 percent from the total revenues of the product subject matter of violation, or a minimum of EGP 500.000 (estimated at USD \$ 31.000) and a maximum of EGP 500 Million (estimated at USD \$ 31 Million).

In order to detect cartels and encourage market players to report cartels in the market, the ECL provides in Article 26 for a leniency programme whereby the first whistleblower is fully exempt from any sanctions stated in the ECL. To benefit from the leniency programme, the Law requires the person to report the violation and provide any supporting evidence s/he may have that helps in proving the violation or leading

to its detection. Afterwards, the court, in its discretion, may grant a partial leniency to the second or any following reporter of the violation.

After the introduction of the leniency programme in July 2014, the ECA received, in early 2015, the first leniency application in a pharmaceuticals distribution cartel case. In this case, the ECA was able to prove that four pharmaceutical distribution companies in Egypt had been engaged in a marketing limitation cartel. This was identified by a written agreement as well as the confessions made by the leniency applicants.

In February 2018, the Economic Court upheld the ECA's finding in a landmark decision and fined the four pharmaceutical distribution companies with a record-breaking fine of EGP 500 Million each. This marked an important development in the Egyptian Competition Law enforcement policy as it was the first leniency case where several factors were tested and put into practice, paving the way for further leniency applications to be submitted.

Abuse of Dominance

As a rule, a firm's market-share should not constitute a violation. It is not the size of the firm or its share of the market that counts, but rather its behaviour in the market that might lead to potential infringements. In this sense, the law addresses restrictive practices resulting in the abuse of dominance, as opposed to market dominance itself.

Article 4 of the ECL defines dominance. Being in a dominant position in a relevant market is the ability of a market-player, holding a market share exceeding 25 percent to have an effective impact on prices or on the product volume in the said relevant market, without its competitors having the ability to limit it.

The ECL regulates the behaviour of a market player having a dominant position. Article 8 of the ECL provides an exhaustive list of prohibited acts regarding dominant market-players. The list includes the following:

1. undertaking an act that leads to the non-manufacturing, non-production or the non-distribution of a product for a certain period or certain periods;
2. refraining to enter into sale or purchase transactions regarding a product with any person or totally ceasing to deal with him in a manner that results in restricting that person's freedom to access or exit the market at any time;
3. undertaking an act that limits distribution of a specific product, based on geographic areas, distribution centres, clients, seasons or periods among persons with vertical relationships;
4. imposing as a condition, for the conclusion of a sale or purchase contract or agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement;
5. discriminating in sale or purchase prices or in terms of transaction between sellers or buyers whose contractual positions are similar;
6. refusing to produce or provide a product that is circumstantially scarce when its production or provision is economically possible;
7. dictating to persons dealing with a dominant person not to allow a competing person to have access to their utilities or services, despite this being economically viable;
8. selling products below their marginal cost or average variable cost; and/or
9. obliging a supplier not to deal with a competitor.

An important area of focus is that of broadcasting sports events. In this regard, the ECA received complaints that BeIN Sports channels are abusing their dominant position in the market of broadcasting soccer tournaments and, in particular coverage of the EURO 2016 Cup and other tournaments. The ECA referred BeIN Sports, as the exclusive broadcaster of various football events in Egypt, to the prosecution

office for two cases of alleged abuse of dominance. The Economic Court upheld the ECA findings in both cases of alleged abuse and fined BeIN Sports approximately US\$50 million.

The ECA also referred the Confederation of African Football ('CAF') to the prosecution office for abuse of its apparent dominant position. According to the ECA, the CAF committed a violation by selling the exclusive broadcasting rights of African football tournaments for the years 2017 - 2028 to a specific company, in spite of the several official correspondences sent from the ECA to the CAF requesting for co-operation and compliance with the provisions of the ECL. In view of that, the ECA rendered a decision nullifying the exclusive broadcasting contract signed by CAF in Egypt, and required the CAF to sign a broadcasting contract with other designated broadcasting companies, with a view to executing its policy of ensuring a level playing field for all current and potential competitors.

The effect of these two decisions on the consumer have been deemed positive, since the consumer had easier access to the said product (i.e. football tournaments) as a result. The question remains whether these decisions impact the market players involved and/or their businesses.

Arguments were raised about the actual nature of the practice; whether it was normal business practice, or an anti-competitive practice. The facts had shown that the choice of a broadcasting company in following a successful bid offer, which is a normal business practice is beyond the scope of the ECL and therefore beyond the scope of the ECA.

Besides, the CAF has the right to market and obtain maximum returns in its broadcast agreements. Imposing a sign of broadcasting contract with some designated broadcasting companies, on the CAF, could be seen as an intervention by a public entity in its business, which may lead to negative effects on conducting business in the Egyptian market.

Another important ECA decision was rendered in December 2018, targeting Apple Corp. After looking into its contracts and sales strategy, the ECA determined that Apple barred its regional distributors from marketing and selling Apple products to Egypt-based distributors. Apple barred its Egyptian distributors from soliciting orders from regional distributors. This behaviour has resulted in the rise of the prices of Apple products in Egypt, in comparison to the regional market. The ECA's position is that the company's monopolistic activities have led to a hike in the prices of Apple products in Egypt beyond the prices in neighbouring Gulf and African States.

In light of its findings, ECA decided to invalidate standard contracts between Apple and its distributors, stating that these contracts isolate the Egyptian market geographically from inter-competition including the prohibition of parallel imports and exclusive distribution agreements, which violates Article 7 of the ECL.

This decision had a strong impact in the market. First, the barriers to distribution were removed, making access to this market easier. Second, the ECA's interventionist power and the enforcement power would have a direct effect on the future distributorship agreements in the Egyptian market.

Again, the ECA decision in this case was largely debated. As to the extent of powers of the ECA under the ECL and the type of interim measures it may take under Article 20 of the ECL came under scrutiny, especially given the ECA did not prove the dominant position of Apple.

ECA's Approach to Merger and Acquisition (M&A) Control

Egypt's approach to M&A regulation is unusual. Apart from the provision requiring post-deal notification, the ECL does not encompass M&A Control, whereas mergers control is generally a part of competition law. The ECL does not grant the ECA the power to approve a merger or acquisition either in advance or subsequent thereto. In other words, the ECL does not provide for either a pre-merger or post-merger

control regime.

The Law, however, provides for a binding post-merger notification regime. Article 11.2 of the ECL empowers the ECA to receive M&A notifications. According to Article 19.2 of the ECL, the notification procedure is obligatory if the annual turnover in Egypt of each of or the combined relevant parties in the last approved financial statement exceeds EGP 100 Million (estimated at USD \$ 5.9 Million).

The Executive Regulations of the ECL specify such details as the notification date; data; documents attached thereto; and submission procedures. Article 44 of the Executive Regulations determines that ECA shall receive notifications from persons involved in the transaction within 30 days from the completion of the legal act concluding the transaction.

According to Article 22 bis of the ECL, failure to notify or delayed notification increases the risk of being fined between a minimum of EGP 20,000 (estimated at USD\$ 1250) and a maximum of EGP 500,000 (estimated at USD\$ 30,000).

The ECA has introduced a M&A notification form and has issued guidelines for submitting a M&A notification that is effective as of the beginning of September 2018. Both the form and the guidelines are available on the ECA website (www.eca.org.eg).

Concerning the notification form, ECA guidelines require detailed information about a transaction, including;

1. names of the merging parties, their nationalities, headquarters and related parties;
2. the transaction nature and the date of its conclusion;
3. approximate market shares of the relevant parties and their competitors in each of the relevant markets;
4. information regarding approximate period for a new competitor to enter any of the relevant markets; and
5. information about the most important clients, distributors, and agents of the relevant parties that relate to their activities in Egypt.

The guidelines include an important clarification relating to foreign investors in Egypt. The guidelines provide that a foreign-to-foreign transaction will now be notified to ECA if at least one of the relevant parties has a turnover in Egypt as per its last approved financial statement, which meets the reporting threshold (i.e. EGP 100 Million, estimated at USD \$ 5.9 Million). This applies regardless of whether or not such party has assets or subsidiaries in Egypt.

The ECA stepped up its efforts in enforcing the post-merger notification obligation, particularly since 2017. A noticeable illustration of enforcing the post-merger notification obligation is in the ECA's decision of October 2018 relating to the merger of Uber and Careem in Egypt. The ECA received information about the potential merger between the two Companies, and the acquisition of the assets of Careem by Uber, which, according to ECA, would lead to the creation of a monopoly and thereby put an end to the competition in the market of ride-sharing in Egypt.

The ECA rendered the decision under article 20 of the ECL, obliging Uber and Careem to notify ECA about any attempt at a merger, and required prior consent of ECA before the effective execution of a merger. The ECA decision stated that ECA may have the power to impose interim reliefs in case of facing obvious negative impact on competition. ECA added that the companies are bound to co-operate with ECA, by providing information concerning market shares, capital, and other relevant information. ECA in this decision reserved the right to take *“any action guaranteeing the competition in the relevant market”* in case of violation of the obligation to notify.

Another recent ECA decision concerning the M&A control was issued a couple of months ago, in May 2019, targeting the online food delivery service market in Egypt. ECA predicted an arrangement between two

companies working in this relevant market, Delivery Hero and Glovo, leading Glovo to exit Egypt's market, in violation of the ECL. In its decision, ECA ordered Glovo to return to the Egyptian market and to reverse its agreement with Delivery Hero within 30 days. ECA's reasoning was that *"The concentration of market power with Delivery Hero could lead to practices that constrain competition and have a negative impact on all players in this market whether users, drivers or restaurants"*.

The ECA's position towards these transactions was very argumentative. Indeed the ECL provides the ECA with the power to intervene in case of harmful effects attributed to anti-competitive practices as stipulated under Articles 6, 7 and 8 of the ECL but this is not the case in mergers and acquisition notifications.

After ECA's decision, Glovo restarted providing its services in Egypt, a positive sign of the enforcement of ECA's decisions, and also a positive impact on the market, giving the consumer freedom of choice of service providers. However, ECA's intervention may have a negative effect from an economic perspective, since it may be seen as an obstacle challenging economies of scale as well as preventing a reduction in cost correlating with increasing scale.

Correlation between Competition, Trade and Investment

Generally, with the increase of globalisation and liberalisation, developing countries are becoming increasingly aware of the need to adopt and enforce national competition laws. Article 2 of the Egyptian Investment Law no.72/2017 draws the link between competition and investment, stating that every investor has to respect freedom of competition and refrain from monopolistic practices.

The establishment of a strong competitive market would attract foreign direct investment ('FDI'), since investors would be reassured that they would not encounter anti-competitive practices in the host country market. However, this should be balanced out with a proper enforcement regime that is efficient, transparent, and predictable.

Investors do not want to be held up by bureaucracy or arbitrary decisions. A fair and effectively enforced competition law is indispensable to developing countries seeking to attract FDI because it signals these countries' willingness to eliminate exclusionary practices by domestic firms on the one hand, whilst allowing developing countries the opportunity to remedy the potential negative effects of FDI on consumers on the other hand.

Over the last five years, ECA's decisions have been a real incarnation of the new economic strategy, aiming to refrain from any monopolistic positions whilst guaranteeing easy entry to the Egyptian Market, in order to ensure the economic development and support of small businesses. An important aspect of the enforcement of the new strategy is that while inspecting any market, ECA screens the whole supply chain. It is mandated to safeguard a climate in which competitors have equal opportunities to compete in all economic sectors. The execution of this mandate however, should be sensitive to business, in order to avoid any over-enforcement that may limit the growth of the market.

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