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I. Introduction

Almost 17 years after the enactment of the Egyptian Competition Law ("ECL"), pre-merger control was finally introduced through the Law No. 175/2022. In the past few years, the Egyptian Competition Authority ("ECA") had expressed concerns about the anticompetitive impact of some transactions taking place in the market. It was not until 2018 when the ECA decided to revive an old but effective EU doctrine, the so-called "*Continental Can* doctrine." According to this doctrine, mergers and acquisitions can be assessed under the substantive provisions of competition law. Arguably, a merger is an agreement which falls squarely within the various substantive provisions of the ECL. While the procedural framework to assess these types of transactions was clear, the elements that remained unclear related to the substantive grounds to assess these types of transactions. Ever since the *Uber* decision, the ECA has intervened by virtue of Article (6) (the sister provision to article 101 of the TFEU) read in conjunction with Article (20) of the ECL against minority rights conferring material influence (*Glovo/Delivery Hero* case). Later, the ECA intervened under the same Article in relation to an acquisition between the largest two competitors in the healthcare sector, which was eventually prohibited, marking the first transaction blocked under the substantive provisions and the legal innovations developed by the *Uber/Careem* precedent in the absence of a merger law.

Generally, M&As and particularly cross-border M&As are considered a very important tool of Foreign Direct Investment ("FDI"). Such transactions are likely to boost national economic growth through the injection of foreign capital. They contribute to the creation of employment, promoting the transfer of new technologies amongst other efficiency gains. Cross-border M&As are also known to be the investors' preference when entering a foreign market. This is because*, inter-alia,* such transactions may mitigate the risk of high entry barriers in some markets. That said, M&As often consist mainly of a shift in the market's structure. They are therefore said to have a significant impact on competition in the market; and in some instances, M&As do in fact strengthen or even create a dominant position within a market, while more generally creating market structures that lead to an anticompetitive outcome.

The ECA's heightened attention to M&A transactions and the sophistication of its analysis in the above cases attracted wider attention from various stakeholders over the potential harmful effects of some of these transactions on the national economy. Finally, a bill was submitted to the government to fill any gaps in the law. This bill, which was eventually adopted by parliament, is intended to serve as a tool to promote procompetitive investments by tackling some of the structural problems inhibiting economic activities in many economic sectors. This stance was encouraged by the IMF who shared the views of the ECA regarding the need to lower barriers to entry for investors that might otherwise have persisted if certain M&As remained unchecked.

The adoption of Law No. 175 of 2022 concerning the amendments to the ECL provisions ("Amendments") brings the ECL much closer to other modern competition regimes, in particular that of the EU, whose influence on the new amendments cannot go unnoticed.

The following article is a general overview of the new Economic Concentration *ex ante* control regime as provided in Law No. 175 of 2022 published on 29/12/2022 and effective from 30/12/2022. It will also highlight some shortcomings that may hinder the results sought from the merger regime and may add bureaucratic burden to businesses without reaching the desired effect for the economy.

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II. Key Features of the Egyptian Merger Control Regime

The law provides for a strict standstill obligation on merging parties in case their transaction falls under the legal definition of Economic Concentration. This definition covers both the acquisition of "decisive influence" (the concept of Control) and the acquisition of Material Influence. It also provides the required financial thresholds for a notifiable concentration, the penalties in case of violation, the procedural and substantive nature of the control, and the powers of the ECA during and after the assessment of the different transactions. The Amendments also introduce the concept of remedies consisting of behavioral and structural measures that the ECA may decide to implement in order to eliminate harmful effects on competition resulting from a concentration.

Although many important aspects of the legislation were left to the executive regulation, it is likely that the Amendments will provide more certainty and transparency on these open issues.

III. The Concept of Economic Concentration

The law defines Economic Concentration as *any change of control or material influence over one or several entities that may be the result of traditional mergers and acquisitions*. The Egyptian law takes a unique approach to tackling the matter of fully functioning joint ventures that exercise an economic activity independent of their parent entities on a long-term basis.[2]

The definitions for "Control" and "Material Influence" are now set out in the Amendments. Unlike change of Control, which can easily be detected through, for example, voting rights or veto rights accorded to a person, granting them actual management or decision-making powers of a given entity, etc., Material Influence is a more complex notion that measures the ability to influence directly or indirectly, another person/entity's strategic and commercial policies and goals, particularly the likelihood that such influence may result in or facilitate a collusive outcome or coordination between competitors.

The Amendments do not clarify the criteria to be used to detect Material Influence and instead explicitly refer to the executive regulation in this regard. It is likely that the executive regulation and the ECA's practice will lean towards adopting a similar approach to the one applied in the United Kingdom. This would not be the first time the ECA relies on UK practices. In fact, the ECA followed the same approach in the *Glovo/Delivery Hero* case when it was assessing the structural links between both undertakings. This case triggered the application of Article (6); in which the ECA took the position that the structural links between the two undertakings led to a collusive outcome prohibited under Article (6) of the ECL. However, the type of transactions that may fall under the concept of Material Influence might not be caught by the jurisdictional threshold. Therefore, it is natural to expect that Article (6) will continue to play an important role in assessing the impact of structural links on competition. Investment funds would likely be targeted by the Material Influence provision, especially in relation to their contribution via minority shares in competing undertakings.

Additionally, the Amendments explicitly exclude internal restructuring operations within the same group and temporary acquisitions of securities from the scope of *ex ante* control.

IV. Jurisdictional Turnover Threshold

Mergers that meet the above tests would also need to meet a financial threshold to be notifiable. The law defines the financial thresholds that would render a transaction notifiable to ECA and at which the transacting parties must respect a strict standstill obligation. The financial thresholds take into account a local nexus to trigger ECA's jurisdiction. Accordingly, a transaction should be notifiable if the combined aggregate local turnover of the parties (including related parties) exceeds Nine Hundred Million EGP (900.000.000 EGP) and the turnover in Egypt of at least 2 of the concerned parties exceeds Two Hundred Million EGP (200.000.000 EGP) for each separately; or if the combined aggregate worldwide turnover of the parties (including related parties) exceeds 7 Billion and

[2] New Article 2 (g) of Law No.3 of 2005.

Five Hundred EGP and the turnover realized in Egypt of at least one of the concerned parties exceeds Two Hundred Million EGP (200.000.000 EGP).

Interestingly, the ECA reserves the right to review any economic concentration falling below the aforementioned thresholds (non-notifiable concentrations) if the transaction will likely give rise to competition concerns. ECA can do so even if the transaction is finalized within a deadline for intervention of 1 year from the date of consummation. In such a case, the ECA can only impose behavioral remedies without blocking the transaction. In general, the introduction of a mechanism to tackle non-notifiable mergers may prove effective in allowing wider intervention against Killer acquisitions, a pattern that affected the Egyptian economy during the pandemic and over the last 5 years, and which led to the disappearance of important start-ups. The acquisition of Souq by Amazon is but one example to mention.

It is worth noting that the jurisdictional thresholds for notifiable mergers are high considering the size of the Egyptian economy. It is not inconceivable that many concentrations can escape the scrutiny of the ECA despite being capable of causing severe damage to competition, mainly in narrow geographic markets such as the hospital market and supermarkets. It is likely that the ECA's intervention in these cases might take place under the non-notifiable merger provisions, where it will be limited to behavioral remedies only. This may not be enough to resolve competition concerns, as evidenced from previous ECA interventions in these markets. This leaves open the question of whether a non-notifiable merger can still be tackled under the substantive provisions of competition law (the so-called *Continental Can* Doctrine) that was used effectively in the past by the ECA. As argued above, the ECA relied on the logical and legal premise of this doctrine since 2018 to intervene against ostensibly harmful economic concentrations. There is nothing in the new amendment that restricts the authority from intervening under these substantive provisions if the concentration falls below the jurisdictional threshold and where behavioral remedies may not be a sufficient measure. The same question is currently posed before the European Court of Justice in Case C-449/21.

It is, therefore, strongly advisable that companies whose concentrations may give rise to competition concerns submit voluntary notification under the non-notifiable concentration provision to obtain certainty and avoid potential risks under Articles (6), (7) and (8) of the Law. The benefit is that the ECA's powers under the non-notifiable concentration provisions are limited to behavioral remedies only. Moreover, the introduction of the concept of Fully Functioning Joint Ventures may suggest that Article 6 ECL will play an active role in the area of joint ventures in general, such as non-fully functioning joint ventures or notifiable joint ventures, that may fail the test of full functionality. In general, parties are advised to consider how to structure their joint ventures deal to avoid risks under Article 6 ECL given the novelty of the concept of full functionality under the Egyptian Legal regime.

V. The Procedural Framework of the ECA's Assessment of Economic Concentrations and Due Process Rights

The Amendments provide a detailed and systematic process for filing a transaction for the ECA's *ex ante* control. The phase one assessment consists of 30 days; starting from the day of the filing, with a possible extension of 15 days in case the parties submitted an acceptable commitment offer. During this phase, a board committee is formed to decide whether to approve the transaction or refer the case file to a "phase two" investigation.[3]

After the completion of "phase one" of the assessment, the board committee will be entitled to resort to any of the following measures: lack of jurisdiction, dismissal (in case the concerned parties abandon the transaction), approving the transaction with or without conditions, or referring the transaction to phase two for in-depth investigations in case the transaction raises

[3] New article 19 bis (c) of Law No.3 of 2005.

serious doubts as to possible harmful effects in the relevant market.

During phase two, the ECA would continue to assess the transaction within 60 days counting from the committee's phase one decision of referral. This, too, may be extended for an additional 15 days if the parties have submitted a commitment proposal. The committee will decide whether to dismiss, reject, approve, or grant conditional approval for the transaction given the circumstances of each case.[4]

The law is not very clear on the circumstances in which the transaction can be impacted by a so-called "stop-the-clock" situation. In various jurisdictions, competition authorities can suspend the deadlines for review if the case file is incomplete or in case the competition authority issues a request for information necessary for their assessment. In phase one, the law states clearly that the clock will start to count once the case file is "complete." Arguably, it is the down to the ECA's discretion to decide whether the case file is complete or not. While this may provide the ECA with the flexibility it needs to conduct its assessment, it may also be burdensome for the parties as the entire period for the assessment may take considerably longer than what is set forth in the law. Here it is relevant to note that nothing in the Amendments tackled the information gathering powers of the ECA. Such powers are generally described under the provisions of Articles (11/3)) and (17) of the law and are mainly relevant to investigation in the areas of cartels and abuse of dominance. Many commentators have argued that these provisions are not adequate tools for *ex post* investigation as they may lead to delays and false negative conclusions.

Parties are therefore advised to cooperate with the authority and prepare their notification file diligently with the right information to avoid any unnecessary delays. Hopefully, the executive regulation will provide more clarity on this point to maintain transparency and prevent the merger regime from turning into a burdensome and bureaucratic process.

The issue raised here also raises the question of parties' rights during the investigation process, mainly their due process rights and access to case files. Moreover, nothing in the law imposes any obligation on the ECA with regard to transparency and accountability. The law is completely silent on these matters, which seriously risks turning the merger regime into a closed process that is difficult to predict.

VI. Substantive Assessment

The new Article (19 *bis* (b)) states that an economic concentration should be declared incompatible if it restricts, prevents, or harms the freedom of competition. The bill submitted to Parliament had a very different wording that included "in particular through the establishment of a dominant position or entrenching or strengthening an already existing dominant position." The test as it is currently worded can capture both unilateral and coordinated effects, including the non-collusive oligopoly effect. The executive regulation shall shed more light on these aspects. Until then, the *Uber/Careem* decision provides extensive details on the methodology that ECA may follow when conducting its assessment.

That said, the second paragraph of Article (19 *bis* (b)) states that the "ECA may approve a transaction after the approval of the council of ministers if:

- without the consummation of the transaction parties would exit the market anyway; or
- if the concentration will yield economic efficiencies that outweigh the harm of competition or that achieves objectives of national security.

The executive regulation shall lay down the conditions for the application of said provision"

It can be argued that the first limb of paragraph two relates to the so-called "falling firm defense." Falling firm defense is a last resort tool that is applied by various competition authorities, usually in times of economic crisis. It remains to be seen how the executive regulation will define this concept.

What is really problematic is, it seems that mergers can only be saved on the grounds of

[4] New article 19 bis (d) of Law No.3 of 2005.

economic efficiency after an approval from the council of Minister. This contradicts well-established international best practice according to which the assessment of economic efficiencies should be strictly made on **measurable economic grounds**. It therefore runs the risk of politicizing the concept of economic efficiency, an already well-defined concept under different provision of the law and capable of being applied effectively by the ECA. Additionally, this would limit the decision-making powers of the ECA when approving transactions since economic efficiency would only be considered after a rejection, therefore adding a further delay to the approval process.

Finally, the consideration of national security is vague and open to many interpretations. It is not unheard of for modern competition regimes to sometimes include considerations of public interest when assessing mergers. In the UK, mergers in the media sector may be blocked if they harm the public interest of media plurality for instance. In other countries mergers can sometimes be approved on grounds of industrial policy. Here, it seems that approvals on national security grounds could be granted even when the merger does not lead to any economic efficiency and is indeed harmful to competition.

It is, however, generally advisable that parties should be ready with an economic efficiency defense from the outset. It is also hoped that the executive regulation will bring more clarity on whether the ECA can approve mergers on economic efficiency grounds or as the literal interpretation of the law suggests, would remain within the vicinity of the council of Ministers.

VII. The Adoption of a Special Regime for Activities Falling Under the Supervision of the Financial Regulatory Authority

The new law created a proliferated competition regime. The Amendments explicitly excluded activities falling under the supervision of the Financial Regulatory Authority ("FRA") from the ECA's jurisdiction. In this regard the new Article (19 (e)) provides that entities exercising an activity falling under the supervision of the FRA should notify the agency of the Economic Concentration. Here, the ECA's powers in relation to the concentration are only limited to issuing a non-binding opinion to the FRA, and their review is only limited to Phase One- type review in which the deadline is 30 days for the ECA to issue its opinion *vis-à-vis* the transaction.

This is another controversial point of law to the extent that it does not clearly define which activities fall under the authority of the ECA and which fall under the supervision of the FRA. For instance, it is not uncommon that economic operators who are active in the services sector may offer, for example, fintech services (an FRA activity) among other services (non-FRA activities), yet the majority of its turnover is generated from non-FRA activities. How such a case will be treated, remains unsettled.

A more complex case is that of holding companies. Many holding companies are established under Article (27) of the Capital Market Law No. 95/1992 which applies to companies whose purpose is "Participation in the formation of companies that issue securities or in the increase of their capital." These companies are not active as such in a given market, and their purpose is limited to investment in other companies. The subsidiaries (as related parties) are however active in different non-FRA activities. If an acquirer intends to acquire the holding company or one of its subsidiaries, would that transaction fall under Article (19(e)), i.e., the FRA notification, or under the ECA's jurisdiction?

Unfortunately, under said provision many of the transactions meeting the jurisdictional threshold may escape the ECA's jurisdiction and undermine the technical independence of the competition authority. It also adds significant uncertainty to businesses who would prefer a one stop-shop process.

VIII. Gun Jumping and Fines

The new Article (22 *bis* (d)) provides harsh criminal penalties if entities fail to comply with the new legal requirements of the merger law.

The penalties range between 1 to 10 percent of the combined aggregate turnover of the parties to the transaction or assets or the value of the transaction itself (whichever is higher). If the above value cannot be calculated a fixed fine of between EGP 30 million to 500 million shall apply.

The fines cover the following infringements:

- Failure to notify the ECA or FRA as the case may be;
- Non-compliance with the conditions set forth by the ECA in case of conditional approval of the transaction;
- Failure to comply with the decision to block the transaction;
- The submission of misleading or incorrect information to the authorities.

In relation to Gun Jumping, procedural gun jumping occurs when the parties implement a notifiable transaction without observing mandatory standstill obligations under the merger control law. Substantive gun jumping occurs when merging parties are close competitors and co-ordinate their competitive conduct prior to the approval of the competition authority. It refers to impermissible collusive conduct, such as the sharing of competitive-sensitive information between the parties to a merger transaction, usually during the due-diligence process. As a general rule, competition laws prohibit independent undertakings from coordinating their competitive conduct in the marketplace. In the EU, procedural gun jumping is prohibited under Article 7 of the EUMR, while substantive gun jumping is prohibited under Article 101 TFEU.

With regard to procedural gun jumping, under the Egyptian merger law, the parties are required to respect a standstill obligation under Article (19(a)). The provision states that “it is not permitted to consummate an economic concentration until an approval from ECA.” However, procedural gun-jumping is not sanctioned because Article (22 *bis* (d)) imposes a fine only in case the parties failed to pre-notify a transaction meeting the jurisdictional threshold and no fines are set for failure to respect the standstill obligation. It could be argued that the fine laid down under Article (22 *bis*(d)) could be stretched to cover procedural gun-jumping. Yet, under general criminal law principles in Egypt, criminal provisions should be interpreted strictly and cannot be stretched beyond the wording set forth by the legislator. This would deprive ECA of a very important legal tool, key to the success of any merger control regime.

That said, parties are advised to seek legal advice from their competition law experts to limit their risks and avoid substantive gun-jumping that can still be effectively caught by Article (6) of the law. It is important that parties take the necessary measures to ensure that the due-diligence process is conducted in a way that limits the exchange of commercially sensitive information, as well as other measures that limit the coordination of uncompetitive behaviors through legal and finance teams.

IX. Way Forward

Upon publication of the new law in the official gazette, the ECA published a press release in which it stated that the new law will not be implemented until the adoption of executive regulation is complete. It is almost unheard of that a press release suspends the application of a law. It is usually the case that the issuing provisions of the law determine the date of its entry into force. This may suggest a lack of coordination between the authority and other governmental entities, which only adds further and prolonged uncertainty. Nevertheless, the law provides improvement to Egypt’s competition policies. The Egyptian merger law, however, suffers from significant shortcomings that may undermine its objectives. The law is silent on due process rights and subsequently undermines the independence of the ECA’s decision making. The fact that the authority will not integrate economic efficiency analysis in its assessment of mergers may deprive the economy and consumers of benefits that could result from certain transactions in the Egyptian market. Moreover, the lack of clarity in relation to the ECA jurisdiction, *inter alia*, adds further burden to businesses and my result in duplication of efforts if the overlapping jurisdiction of the ECA and FRA is not resolved. It is also relevant to note that many provisions of the law may unnecessarily deprive the merger regime from its effectiveness and turn it to a business hurdle rather than a business enabling tool.