

Africa

Overhauls that Egypt Missed in Its New Amendments to the Egyptian Competition Law

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I. Background

With the recent increase in investments across the African continent, it is vital that we view competition policy as a key driver of economic growth and to highlight the indispensable role competition authorities play as enforcers of competition policy within relevant economies. Over the past couple of years, African competition authorities have actively engaged in efforts to address challenges related to the increased investment, with a general trend towards greater enforcement of competition policies and limiting infringements across the continent.

The Egyptian Competition Authority (“ECA”) has been playing a particularly active role in terms of merger control and antitrust enforcement. For several years now, Egypt has been trying to secure a better economic environment for its competition regime. The ECA has tried to pursue a more dynamic role in merger control and antitrust enforcement and has continued with such efforts despite the obstacles caused by a lack of jurisdiction to block transactions that may, have a negative effect on the Egyptian market, since only a post-merger notification was required.²

The ECA’s enthusiasm is evident in, for instance, the famous merger between Uber and Careem that took place back in 2019. In this case, press reports noted that Uber and Careem, two leading ride-sharing services across the MENA region – where both service providers are MVPs – had discussed a potential merger. Even though no deal was signed, and hence according to the ECA’s powers at the time, a pre-merger notification was not compulsory. Nonetheless, the ECA argued that its jurisdiction allowed it to investigate proposed mergers prior to their conclusion. It thereby asserted that such a merger would effectively

result in an anti-competitive agreement between two horizontal competitors.³

The decision over Uber and Careem was not the only case where the ECA sought a different approach. In another transaction, between Glovo and Delivery Hero, messages were sent to Glovo’s employees in Egypt informing them of the acquisition decision and instructing them to suspend operations in Egypt. Such concentration of market power in Delivery Hero’s hands could, the ECA argued, have led to practices that constrained competition and had a negative impact on all players in the Egyptian online food delivery market. The ECA therefore interfered, ordering Glovo to return to the Egyptian market and scrap its agreement with Delivery Hero within 30 days.⁴

Ever since this decision, the ECA has been trying to amend the provisions of the Egyptian Competition Law 3/2005 on the Protection of Competition and Prohibition of Monopolistic Practices (“Competition Law”). After holding off on the approvals ECA received from the Prime Minister on November 25, 2020, and following the discussion with the Egyptian parliament’s Economic Affairs Committee which started on the amendments on February 18, 2021, a new Egyptian merger control regime was finally introduced at the end of 2022.

II. Pre-Merger Notification Regime

On December 29, 2022, the Egyptian House of Representatives approved the proposed amendments by the ECA under Law no. 175/2022 (“New Amendments”), and new provisions to the Competition Law finally came into force on December 30, 2022, following their

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² OECD Annual Report on Competition Policy Developments in Egypt: [https://one.oecd.org/document/DAF/COMP/AR\(2021\)44/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2021)44/en/pdf).

³ ECA PRESS RELEASE: <http://www.eca.org.eg/ECA/News/View.aspx>.

⁴ ECA PRESS RELEASE: <http://www.eca.org.eg/ECA/News/View.aspx>.

publication in the Egyptian Official Gazette.⁵ It appears that, due to the time elapsed since the approval of the draft law in 2020, and to the ECA's past attempts to gain powers over transactions affecting the Egyptian competition regime, no transitional or grace period will be granted. Hence, the amended merger control regime will typically apply to all transactions that are signed on or after December 30, 2022. Transactions that were signed but not closed before December 30, 2022 will remain subject to the old merger control regime. However, as a consequence of some ambiguity related to filing procedures, requirements for the new filing regime, and calculations, the ECA is likely to start implementing the new merger control regime only after the executive regulations are issued, by the start of June 2023. The ECA has nevertheless announced in a press release that the authority is likely to start executing substantial measures that are deemed necessary until the actual implementation of the New Amendments. However, these substantial measurements remain vague.⁶

The bulk of the overhaul seems to be influenced by international experience, in particular the approaches of the EU Commission and the Common Market for Eastern and Southern Africa ("COMESA"). According to the New Amendments, the transition from a post-closing notification regime to a pre-merger notification regime finally came into effect. Other modifications include a new turnover threshold, the introduction of filing fees, timeline and approval deadlines, a merger assessment test, assessment powers, higher penalties, as well as some exclusions from the New Amendments. New definitions were also introduced, i.e., Economic Concentration, Control, Material Impact, Corrective Measures, and Behavioral Measures.⁷

III. Overlooked Amendments

Despite the numerous amendments that were made to the Competition Law, the needed refinement of competition market clauses, and the jurisdictional powers given to the ECA, there remain a number of concepts that were still overlooked, and which may hamper the ECA from achieving its ultimate goal of ensuring that market agencies carry out their economic activity in a way that does not harm competition.

A. One-Stop Shop

Egypt has been a Member State of COMESA for over two decades now. Recently, the COMESA Council of Ministers issued a set of COMESA Competition Regulations ("Regulations") and COMESA Competition Rules ("Rules") to regulate competition within the 21 Member States. Egypt, as well as other Member States, have national competition laws that apply to transactions at a national level. These Regulations, on the other hand, are relevant for transactions with cross-border effects and were an attempt to harmonize merger control procedures in the COMESA region. However, some Member States still resist following such orders by imposing their national competition laws on international transactions. In addition, COMESA's Competition Commission ("CCC") assigned itself as a one-stop shop for international transaction issues, a position that several Member States have quietly rejected or failed to recognize, still requiring separate notification despite their membership in COMESA. For instance, Egypt has still not fully committed to the CCC's one-stop shop. This is counter-productive to the CCC's goal of streamlining merger control reviews in the region. Consequently, undertakings will have to make several filings despite having a one-stop-shop concept. This does not just increase the cost and complexity of a transaction but also creates the risk of receiving conflicting decisions from different regulators.

⁵ Egyptian Official Gazette, New Amendments to the Egyptian Competition Law: <https://alamiria.laalaws.com/ETash/DocViewer?isDet=7Pev2/OcJmg=&&P=PPB5EOm2F1IAUWpwZgcNyrSvOFFEw+24&&plD=ZG Wfw8dDpn8=&&T=H//ljZ2DqEs=&&MP=Xzdf9B3chcc=>.

⁶ ECA PRESS RELEASE: <http://www.eca.org.eg/ECA/News/View.aspx>.

⁷ Egyptian Official Gazette, New Amendments to the Egyptian Competition Law: <https://alamiria.laalaws.com/ETash/DocViewer?isDet=7Pev2/OcJmg=&&P=PPB5EOm2F1IAUWpwZgcNyrSvOFFEw+24&&plD=ZG Wfw8dDpn8=&&T=H//ljZ2DqEs=&&MP=Xzdf9B3chcc=>.

It is understood that the CCC has negotiated a number of Memorandums of Understanding (“MoUs”) with some Member States to address these challenges and to develop procedures on how cooperation and coordination can be achieved with regard to merger notifications, merger review, and investigations into anti-competitive practices. Egypt has not, however, signed a similar MoU at this time. Moreover, even the signed MoUs outline mechanisms for coordination, consultation, and collaboration between the CCC and the Member States. The mechanisms envisioned, *inter alia*, require the members to notify each other when they become aware that enforcement activities may affect the other party's interests, as well as regulating the exchange of information between signing parties. However, it appears that most of the MoUs lack an explicit mention of the CCC's enforcement powers as a one-stop shop regime. Therefore, the MoUs do not appear to alter or dilute the position of dissenting national competition laws concerning the role of the CCC as a one-stop shop.

The New Amendments do not deal with the jurisdictional powers to block an international transaction. The fact that Egypt's New Amendments to the Competition Law require a pre-merger notification with filing fees and higher penalties, therefore, appears to make the issue a matter of extraterritoriality, which could get more complicated. Under the old post-closing regime, this dual notification requirement only applied informally. Furthermore, the New Amendments do not discuss any local nexus test. Hence, transactions without a local nexus in Egypt may still have to be notified under the new pre-merger notification regime, provided that the worldwide thresholds are met. With that being said, there are now two separate legal regimes to regulate the enforcement of competition policies in Egypt: the Competition Law and its New Amendments, as well as the Rules and Regulations of the CCC.

In practice, it has become clear that the relevant parties cannot rely on their notification to the CCC as legal grounds for not notifying the

national competition authority. Consequently, where the ECA calls upon the relevant parties for filing, despite notifying the CCC, the relevant parties will mostly abide by the ECA's order. This is because, pragmatically speaking, obtaining approval from the CCC is irrelevant to a national competition authority's ability to prohibit a transaction through its local competence.

From a different perspective, the Regulations do not preclude the ECA – or any other national competition authority of the Member States, from reviewing transactions, just as they do not exclude the CCC from invoking the national merger control regimes by passing over the review and directly calling on the relevant parties to present a local notification for a cross-border transaction that meets the notification requirements of the particular national competition law. Moreover, where a Member State establishes that the implementation of a merger may harm local competition to a great extent, a referral request may be made to the CCC. As a matter of fact, Egypt reviewed over 21 notifications from COMESA in 2020,⁸ to examine the potential impact on the Egyptian market. Theoretically, this is a great initiative, however, it remains unclear what would happen if the ECA and COMESA assessments contradict each other. For instance, in 2019, the ECA received a request from the CCC to investigate the 100 percent acquisition of Americana Group subsidiary “Greenland” by the Lactalis-Halawa Group. In this transaction, the ECA assisted the CCC in determining whether the acquisition would affect competition in the COMESA common markets or not. The ECA investigations revealed that the acquisition may lead to limitation of competition and a monopoly in certain market segments, and was likely to harm the dairy market in Egypt.⁹ The CCC nevertheless approved the takeover. At the time of the transaction, undertakings to a transaction were not required to pre-notify the ECA, and pre-merger notification was exclusively mandatory to the CCC. In light of the recent developments, with both national and international regulators requiring a pre-merger

⁸ OECD Annual Report on Competition Policy Developments in Egypt: [https://one.oecd.org/document/DAF/COMP/AR\(2021\)44/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2021)44/en/pdf).

⁹ ECA ANNUAL REPORT: <http://www.eca.org.eg/ECA/Publication/View.aspx>.

notification with powers to block transactions and impose penalties, it remains unclear which of their decisions should prevail.

B. Hub-and-Spoke Arrangements

Another crucial concept the Egyptian legislature overlooked in introducing the New Amendments is that of “hub-and-spoke” arrangements. While this concept is not as popular within the African region as it is in the EU, for example, it is still a vital consideration, especially considering Egypt’s current economic situation. Hub-and-spoke arrangements are triangular schemes that involve economic players operating at different levels of the supply chain, thus containing both horizontal and vertical elements. They often relate to prices, supply intentions, or business strategies. Under EU competition law, hub-and-spoke arrangements are mentioned in the section on Horizontal Guidelines related to information exchange¹⁰ and they are also briefly referred to in the Vertical Guidelines, paragraph 224, which concerns retail price Maintenance.¹¹ While information exchange is not explicitly mentioned in the Competition Law, New Amendments, or any guidelines that are issued by the ECA, the Agency appears to have taken different measures to ensure they achieve fair competition. Therefore, if the ECA were to notice any direct or indirect effect from the exchange of information on competition, it is likely to take a more restrictive position towards it in the future. In addition, the ECA does not look at agreements on their merits, but rather at the consequences they may have. Whether hub-and-spoke information exchange will be considered a violation as a by-object or by-effect restriction in Egypt to be determined.

In August 2019, chicken brokers agreed to fix the selling price of live white chicken between breeders and wholesalers in Egypt. The agreement led to large financial losses for the breeders, which resulted in a few players exiting the white chicken breeding market. In terms of the chicken market supply chain, brokers play the role of intermediary between the breeder

and the trader – a sort of triangular scheme, where the breeders depend on brokers to market the live chickens produced and traders rely on brokers to direct them to the farms that sell live chickens. The market investigations, testimonies from various market players, and qualitative and quantitative economic analyses confirmed the existence of collusion between the brokers which led to the market being negatively impacted. On March 8, 2020,¹² the ECA concluded that this agreement restricted competition in violation of Art. 6(a) of the Competition Law and decided to refer the case to the Egyptian public prosecutor. The Economic Court thereafter issued its decision, upholding the decision by the ECA in relation to cartel activity in the market for chicken brokers. In this case, the exchange of price information happened through the Facebook pages of all three cartel members. The exchange was deemed an implicit agreement and the three companies were fined the amount of EUR 3.7 million. Criminal charges were also laid against individual brokers who participated in the cartel activity. On appeal, the Economic Criminal Court of Appeal acquitted the three defendants. It appears, therefore, that the ECA plays a dynamic role and is influenced by the EU’s competition policies and practices. Providing such powers to the ECA explicitly by law could potentially boost its role in catching more anti-competitive practices.

IV. Conclusion

The New Amendments to the Egyptian merger control regime show positive steps in terms of monitoring the Egyptian competition market and providing the ECA with a more efficient and legitimate role. The pre-merger notification requirement could, however, create additional complexity since COMESA also requires pre-merger notification. Moreover, the COMESA notification is non-suspensory whereas the new Egyptian regime would prevent the closing of an agreement until the ECA has granted its approval. Additionally, hub-and-spoke

¹⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance. OJ C 11, 14.1.2011, p. 1–72, para 55.

¹¹ Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1–46.

¹² ECA PRESS RELEASE: <http://www.eca.org.eg/ECA/News/View.aspx>.

arrangements are vitally harmful to competition. The ECA can make use of all its investigative tools (i.e. inspections and requests for information), which includes the possibility of parties that actively cooperate with the ECA

during investigations in settlement procedures or cooperation practices in return for a reduction in fines. The ECA can also make use of its recent Leniency Program in this regard.