How to use a spoon to cut a steak: The Egyptian Competition Authority's guide to how to use anti-cartel legislative provisions to control and review mergers

Egypt does not currently have a law that allows or empowers the competition regulatory authority ("**Egyptian Competition Authority**" or the "**ECA**") to review, approve or disapprove mergers whether prior to or following their completion. Since the adoption of the Egyptian Competition Law No.3 for the year 2005 as amended- (the "**Law"**) more than a decade and a half ago, the ECA has been fighting and lobbying for a proper pre-merger control regime, all in vein. The Law itself is conceived and perceived by the legislator as a tool to fight monopolistic practices: a merchant or a group of merchants who hog goods and restrict supply in order to raise their prices. So when faced with the question: "Should we prevent companies from merging or assess, in advance, the presumed harmful effect of said merger and take preventive measures in this regard?"; the Legislator's presumed answer has been so far: "no, why should we? Let them merge and the ECA will oversee what the resulting entity would do. Why should we overwhelm and swamp the regulator with the task of having to study and review countless transactions and add another layer of bureaucracy to an already saturated environment". Add to this presumed reasoning, the Egyptian Government's policy towards the turn of the millennium was directed full stream towards a transition from a quasi-socialist public sector dominated economy of the Nasser and the post-Nasser era towards a growing and efficient private sector driven economy. In this context, putting additional bureaucratic obstacles to this desired private sector growth and consolidation was not at all a priority from a legislative policy point of view. Since 2005, the Law has been in fact amended a handful of times[1], but nothing has ostensibly changed on this front despite the drastically changing environment (two revolutions and three presidencies) and aside from sporadic rumors, there is still no concrete and serious indication that a comprehensive pre-merger control regime is anywhere near obtaining enough support in Parliament or on the Government's legislative agenda.

What the ECA has managed to obtain through the Law, as a compromise of some sort, is the power to gather some "post completion" information about transactions of a certain size and this in order to keep themselves up-to-date and to facilitate their task in studying relevant markets when needed.

As things currently stand, Article 19 of the Law requires mergers and acquisitions of a certain size and of almost any shape and from to be merely notified to the ECA within 30 days from the date on which the merger (or the acquisition) comes to effect. The threshold for notification is the cumulative turnover generated in Egypt of EGP 100,000,000 (USD 6,000,000 approx.) and the modalities of notification are laid down in Articles 44, 44(bis) and 45 of the Executive Regulations of the Law[2]. Failure to make the notification as required is penalized as per Article 22(bis) of

[1] 2008, 2010 and 2014

[2] The relevant articles specify the notifiable transactions, the person legally responsible for the notification (The acquirer or the merging entity), the documents needed, the calculation of the turnover for the purpose of the minimum threshold, etc. Further information on the notification form is published on the ECA website: www.eca.gov.eg

the Law with a fine that ranges between EGP 20,000 and EGP 500,000. It is therefore obvious that there is nothing in the Law that would require the clearance or the pre-approval of the merger by the ECA, period.

Then one fine morning, on October 23rd, 2018, the world woke up to the ECA issuing a first of its kind decision that requests ride hailing tycoons Uber and Careem to obtain the pre-approval of the ECA before completing their "contemplated" merger, brought to the attention of the latter through market rumors and hearsay -basically (ECA Decision 26 for 2018- the "**Decision"**).

The Decision in fact considers Uber and Careem as competing entities with their contemplated merger a form of collusion that is penalized under Article 6(a) and (d) of the Law (governing the prevention of cartels). The Decision itself is issued by the ECA in application of Article 20 (para2) of the Law which entitles the Board of Directors of the ECA to intervene if they conclude from the appearances and ostensible proof that a certain act, contemplated or committed, constitutes or would likely constitute a breach of the Law with potential imminent and irreversible damages to consumers and/or to competition itself.

The Decision actually puts Uber and Careem in front of a concrete risk which is, in plain language: ignore us and go on with your merger and you will be certain to be prosecuted for collusion in breach of Articles 6(a) and (d) and you will be even subject to double the normal penalty (which is 2% of turnover or maximum EGP500,000,000) because you would also fall under Article 22 (para2) for ignoring or not complying with the Decision. The Decision went on however to add that: if you think your merger would be beneficial to consumers or to competition then you will have to convince us by applying for a clearance, a pre-approval or an exemption (Article 6 (para 2)- governing requests for exemptions from the provisions of Article 6 (para 1- (a), (b), (c) and (d))), and we promise we will reply to your request within 60 days from the date you have provided all documents and argumentation.

Frustrated from the lack of proper legislative tools, the ECA has finally decided to react and to take matters into its own hands. Chosing to ignore the fact that the Law does not provide for the desired interventionist approach in regulating mergers, the ECA are stepping themselves in to assume more regulatory and authoritative powers by transforming the existing post-merger notification regime into a *de facto* pre-merger authorization requirement that is not legislatively supported by the Law.

We are not here to debate whether or not the ECA is addressing a common and legitimate competition law concern, we are merely highlighting that the ECA's approach, as expressed in the Decision, is bound to create serious legal and conceptual issues (we counted four fundamental ones) that would probably undermine and ultimately compromise its crusading efforts against alleged "abusively oversized conglomerations". Of course some people may feel intimidated by the ECA's change of heart and policy, like Uber and Careem

apparently did[3] and may pragmatically cave in and file for clearance from the ECA prior to their merger, but the legal and conceptual issues are there and will not go away.

The **first issue** is that the Law requires parties to a merger to merely make the notification within a certain timeframe from closing the transaction without waiting to obtain clearance or pre-approval from the ECA (Article 19 of the Law). The Law, which imposes criminal sanctions and is therefore a criminal law in essence, cannot, as a matter of fundamental legal principle, be interpreted or constructed extensively beyond the strict wording/text[4]. If Article 19 tells people to notify their transactions within 30 days from closing and punishes them for failing to do so, how can the ECA come and prosecute someone who did not fail to make the notification within the set and prescribed deadlines? The strict interpretation and construction of the penal text requires that no person who follows the text of Law (Article 19) and files the notification within 30 days from closing, be penalized for not filing for ECA approval prior to closing. By the same token, an entity who did not collude with its competitors to raise prices, limit supply, rig bids or divide market along non-competitive lines (Article 6(a), (b), (c) and (d) of the Law) must not be penalized under these strict and specific provisions for simply merging with another entity without notifying and obtaining the prior approval of the ECA. In order for the ECA to be able to prosecute merging entities under this Article 6, probably a sub-article (e) should be have been added: "(an agreement between competitors is prohibited) if it results in a merger between those competitors without said merger being approved by the ECA in accordance with the procedures of Article X of the Law and its Executive Regulations". Since said sub-article 6 (e) does not actually exist, the ECA may not use the currently worded Article 6 to prosecute the competing entities who merely contemplate a merger.

Furthermore, the true intention behind Article 6 (para 2) of the Law (on the modalities of application for ECA approval or exemption), as clearly expressed in its wording, is to allow competitors to obtain comfort/clearance from the ECA regarding their on-going mutual arrangements which they consider beneficial to the consumer and to their industry as a whole, while they continue to compete amongst each other as usual. There is in fact nothing presumed, assumed, implied or explicit in said Article that requires competitors to obtain the ECA pre-approval if they aim to merge and to become one consolidated economic interest. The ECA role as contemplated in Article 6 (para 2) is merely to draw the line between what competitors can legitimately do and not do in coordination together while remaining in full competition with each other, uninterrupted. Nothing in Article 6 (para 2) requires a party to a merger to notify the ECA in advance and therefore said Article must not be expanded and used to impose an obligation that the legislature did not require or contemplate.

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[3] AlBorsaNews.com, March 26, 2019

[4] The strict construction of the penal law is a universal principle applicable in both civil law and common law systems.

The **second issue** is the attempted application of Article 6 essentially worded and designed to target a group of colluding competitors -as defined in Article 2 of the Executive Regulations- on one economic entity -as defined in Article 2 of the Law and 5 of the Executive Regulations. In criminal law terms, it's like accusing someone of conspiring with himself to commit a crime, or, mental illness hypothesis aside, like prosecuting an affiliate for following the policies of its own parent company using the provisions related to the prevention of cartels.

We understand that the logic of the ECA, however questionable it may appear to the neutral penal law expert observer, is that the ECA wish to prosecute the parties to a merger prior to completing the merger on the grounds that this merger is merely a form of cartel disguised as a merger. Had this logic been sound from a general competition law perspective, none of the specific merger control legislations would have been needed. In fact, merger control regulations requiring pre-approval are the actual "universal" norm[5] and they all operate fundamentally outside the realm of the specific cartel prevention regulations. In fact, Article 7 of the European Commission ("**EC**") merger control regulation (EC 139/2004) admits explicitly that "Articles 81 (and 82) [of the Treaty of Rome], […] are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty". Had the cartel prohibiting regulation been adequate and sufficient to prevent abusive "concentrations", the EC would have never had to issue a specific merger control regulation (EC 139/2004).

The **third issue** is that the Law does not punish or prevent mergers under any circumstances, and, as a matter of fact, the Law does not even punish agreements between competitors on a *per se* basis. Putting on the criminal investigator's hat, the ECA has the duty and the obligation, well before referring "alleged colluders" to prosecution, to prove that an agreement between them, implicit or explicit, exists and that it has caused "harm" by resulting in abusive price manipulation, artificial market allocation, bid rigging and/or unlawful barriers to output. The presumption of guilt of the two parties contemplating a merger runs against all criminal law and constitutional law principles on several levels. The Decision effectively shifts the burden of proof to place it upon the parties to a merger irrespective of the established legal principles and the universal presumption of innocence doctrine, all without grounds and justification in the penal text itself. Using the ECA logic, the ECA may prosecute any group of natural persons who decide at any point in time to start a business and to become shareholders in a company because those natural persons can be presumed to be competitors by default and their joint venture, which is an agreement to do business under agreed terms and common strategies, would be subject to scrutiny from a perspective that those individuals would have never legitimately expected. In fact, neither the Law nor the Companies Law require the founders or the shareholders of a company to seek the approval of the ECA as a requisite for incorporating their new venture.

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[5] See the HSR Act in the US issued in 1976 and amended in 2001- 2005 and 2011- Sections 5 and 6 of India's Competition Act of 2002, etc.

Finally, the **fourth issue** here is that, assuming for the sake of argument that it applies to mergers and to the agreements to merge, the exemption mechanism laid down in Article (6) (para 2) which allows competitors to obtain for comfort the pre-approval of the ECA ahead of concluding any mutual arrangements, does not specify neither the validity period for said exemption (if granted) nor what would become of said exemption once the applicants are no longer competing entities following a merger. Article 6 (para 2) does not provide for any ECA follow up guidelines. It does not specify at what point in time the agreement between competitors no longer fulfills the requirements under which the clearance that has been granted. Articles 15, 16 and 17 of the Executive Regulations of the Law regulate the cases when an exemption from the applicability of competition law in general is granted to a private sector company managing a public utility sector: the application, the documents, the notices, the deadlines, the delays, the review process (every two years), etc. while the exemption under Article 6 (para 2) of the Law is not included in this procedural regime nor instated anywhere else for all that matters. Several questions may be raised as a consequence: are the exemptions granted to competing entities perpetual or are they subject to periodical review? What are the documents required? Modalities of application? Deadlines? Delays for review? None of those questions can be answered confidently and conclusively even by the most hawkish defender of the ECA stance.

Now, in the current circumstances, is it recommended for the parties to any potential merger to proceed with the merger and then notify the ECA in accordance with current notification/merger control regime or is it better to seek the clearance/approval of the ECA ahead of any concrete steps towards merger?

The natural approach is to abide by the provisions of the Law and to make the notification when the notification is due, post-closing and without need for clearance and approval. This approach under the current circumstances, in view of the legislative shortfalls and the ECA's questionable interventionist approach, has a significant risk element. In fact, going through the merger without seeking the ECA approval would entail a high risk of prosecution especially if the merging entity is expected to yield a significant market power over its competitors once eventually created. The high risk of prosecution does not mean that the case is lost before a neutral judicial forum, it merely means that the parties to the merger will be likely taken to court by the ECA. There is absolutely no precedent to predict the outcome of the case by then, and we don't know whether the Public Prosecutor and ultimately the competent economic court would agree with the ECA in their approach and interpretation of the Law.

The other approach, which was apparently followed by Uber and Careem, is to prepare a comprehensive file and seek the approval of the ECA ahead of the merger. If the ECA agrees, on the basis of the ECA presumptions and after its much publicized societal consultations[6], that the agreement to merge is not a harmful collusion, then they may not prosecute the parties to the merger merely because of their agreement to merge. But the matter is unfortunately not that simple. The

[6] http://www.eca.org.eg/ECA/News/View.aspx?ObjectID=6283

ECA in the Decision said that they would issue their conclusions within 60 days from the date all "requested" documentation is duly delivered. It means that if a document is "not deemed to have been provided", the 60-day period would not start running. The process of requiring and providing required documentation to the "satisfaction" of the ECA may be extended by additional ECA requests and clarification thus extending the process and delaying the merger for a very long time, as all is under their sole discretion.

Assuming the clearance is granted, would it be perpetual and irreversible? What would happen if the ECA concludes that the assumptions on the basis of which the exemption has been granted turned out to be wrong and the parties did not fulfill their obligations towards obtaining said exemption? Can the ECA undo the merger? Can they prosecute the parties to the merger and fine them on the basis of Article 6 (anti-cartel)?

What is sure is that the ECA cannot and does not have the tools to undo the merger. It cannot prosecute the merging entity for colluding with its own self on the basis of Article 6. The ECA would assume however that it may still go after the original shareholders of the merging entity if the assumptions and assurances based on which the exemption was granted turned out to be false or misleading or if the merging entity did not honor its obligations towards obtaining said exemption. But what about if the merging entity went public for example and the original shareholders who agreed to merge their interests are no longer there to be held accountable for the actions of the merging entity?

In all cases, the real dilemma facing the parties to a merger if they decide to follow the second approach and file for an exemption, is that there would be actually nothing that guarantees that the ECA will not come back in one year or two years and request the review of the merger on the basis of their initial approval/exemption. The parties to a merger would have to have admitted, as per the requirement of Article 6 (para 2), that the merger itself is presumably harmful to competition but that this harm is overshadowed by the benefit it brings to consumer and/or the concerned industry. The ECA would be therefore given the power to review the merger post completion through the indeed unintended will of the applicants and the ECA may be able to revoke its approval/clearance in the future without maybe having to prove that the merging entity has committed anything wrong from a pure competition law perspective (probably conscious of this shortcoming, the ECA were eager to emphasize in their press release[7] that Uber and Kareem have decided to subject their merger contractually to the pre-approval and consideration of the ECA). The ECA may actually use the admitted presumption of harm to competition against the parties to a merger if they simply establish that the promised and desirable effect of the merger did not materialize following the merger. They may say, for example, that the merger was approved on the assumption that the prices would not increase, and that, since the prices have increased against the applicants promises and assurances, the ECA would like to revoke their clearance/exemption accordingly. By then, since the merger cannot be undone (the agreement to merge is already finalized and concluded),

[7] Published on the ECA website on March 26, 2019 (www.eca.org.eg)

the parties to the merger may be subjected to harsh scrutiny and prosecuted, and this despite the fact that the increase in prices is not *per se* a punishable act under the Law and that the parties to the merger are no longer competitors as a matter of new reality, or may be no longer stakeholders in the prosecuted undertaking.

On a related note, if the parties to a merger decide to follow the second approach and file for an exemption, then the ECA's Decision would have effectively operated as a legislative amendment to the Law, as it currently stands, which cannot be according to established legal principles. Effectively, the ECA's Decision will have brought about a *de facto* amendment of the Law in absence of the necessary *de jure* reform by the legislature that is the only entity entrusted with the authority to make amendments to the Law.

Indeed the concerns of the ECA are legitimate. Indeed they are right to worry about concentrations and the inherent abuse of market power of the mega undertakings. But until Egypt passes a law that empowers the ECA to review and approve mergers in accordance with common international practice, the don quixotic approach and bending of regulations to use them for unintended purposes would do nothing but backfire and create, unnecessarily, an environment of uncertainty, unpredictability, confusion and hostility towards investors, local and foreign.