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THE NEW MERGER CONTROL REGIME IN EGYPT: FROM POST-CLOSING NOTIFICATION TO PRE-CLOSING CLEARANCE

Hadil Helmy

CeCo CentroCompetencia

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Hadil Helmy
Administrative Prosecutor at the Egyptian Administrative Prosecution Authority and an LL.M. candidate at George Washington Law School with a concentration in Business Law and Antitrust Law and Policy. Before, she was head of the Contracts and Legal Advice Department at Wadi Degla Holding Company, as corporate lawyer.

Abstract: Merger control policies are a major pillar in any antitrust regime. Currently, over 130 countries have competition policy systems, and only a few of them do not have pre-closing clearance in their merger control regimes. Egypt was one of these few countries until December 2022 when a new law was enacted amending the competition law in Egypt to adopt pre-closing clearance policies for merger and acquisition transactions. This Article gives an overview of the Egyptian competition system and gives insights into the provisions of the above-mentioned new law. In addition, the Article focuses on analyzing the merger control regime in Egypt and the competition authority's relevant practices before and after the enactment of the new law.

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I. INTRODUCTION:

Egypt has a comprehensive legal framework for the protection of competition that aims to prevent anticompetitive practices and promote fair competition in the marketplace. The legal regime for competition in this country is governed by Law No. 3 of 2005 (**"ECL"**) and its Executive Regulation foreseen in Decree No. 1316 of 2005, issued by the Prime Minister (the **"Executive Regulations"**).

The ECL was amended several times in 2008, 2014, 2019, and more recently in 2022 by virtue of law No. 175, issued in December 29 of that year (the **"Recent Amendments"**). The Recent Amendments resulted in dramatic changes to the previous merger control regime set forth by ECL. Particularly, it alters the merger control policy from a ***post-closing notification obligation*** to a ***pre-closing approval*** mechanism, adding Egypt to the map of countries exercising *ex-ante* control of merger transactions.

The primary purpose of this Article is to explore and assess the Recent Amendments, and to draw the status of the merger control regime in Egypt before and after the Recent Amendments. In particular, this document outlines the following topics:

i. General insights on the law governing competition in Egypt;

ii. The primary regulator of the competition law in Egypt and its main enforcement powers;

iii. The merger control regime in Egypt prior to the enactment of the Recent Amendment: ex-post notification regime;

iv. The merger control regime in Egypt post adoption of the Recent Amendments: ex-ante merger approval regime; and

v. Conclusion.

II. GENERAL INSIGHTS ON THE LAW GOVERNING COMPETITION IN EGYPT

The issues that will be addressed below are the following: **(A)** anticompetitive practices, **(B)** scope of application, **(C)** the enforcement authority, and **(D)** sanctions and leniency policy.

A. Anticompetitive Practices:

ECL regulates the economic activities and practices that may prevent, restrict or harm the freedom of competition in the marketplace. The Competition Law governs, *inter alia*, the following acts:

- The horizontal agreements among competitors in any relevant market[1] (Cartels) if they involve: (a) increasing, decreasing, or fixing prices of sale or purchase of underlying products; (b) market division or consumer allocation; (c) bid-rigging; or d) restricting the production, distribution or marketing operations of any relevant product[2].

- Agreements between a person[3] and any of its suppliers or customers, if such agreement restricts competition (vertical restraints)[4].

- Acts that constitute abuse of dominant market position[5].

- Merger control regime.

B. Scope of Application

ECL does not only apply to the acts that take place within the Egyptian territory but also to the acts committed abroad, when such conducts lead to harmful effects on competition in the Egyptian market[6].

It is worth mentioning that the public utilities managed by the State are excluded from the scope of the ECL. Also, the Egyptian Competition Authority may, upon request of the concerned parties, exempt some public utilities that are managed by private companies from the scope of ECL (provided that such exemption serves the public interest or attains benefits to the consumers that outweigh any adverse effects on competition in the marketplace).

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1 According to Article 3 of the Competition Law, the relevant market is the market which consists of two elements, namely, the relevant products and the geographic area. Relevant products are products considered to be practical and objective substitutes to each other. The geographic area means a certain geographical territory where competition conditions are homogenous while taking into consideration the potential opportunities for competition.

2 See Article 6 of the ECL.

3 According to Article 2 of the Competition Law, person means any natural or person, economic entities, federations, financial assemblies and assemblies of persons, whatever their means of incorporation, and other related parties in manner prescribed in the Regulations.

4 See Article 7 of the ECL.

5 See Article 8 of the ECL.

6 See Article 5 of ECL.

Moreover, the referred exemption is granted for only two years period; subject to extension upon request of the concerned parties[7]. During the exemption period, the Egyptian Competition Authority has the right to monitor the exempted parties to ensure their compliance with the conditions and limitations of the exemption. If any exempted party violates these conditions, the Egyptian Competition Authority may, among other alternative actions, cancel the exemption[8].

C. The Enforcement Authority:

ECL dictated the establishment of the Egyptian Competition Authority ("**ECA**" or "**Authority**"), the primary competition law regulator in Egypt. It regulates the ECA's conformation, management, activities, and enforcement powers. Section II of this Article presents more detailed insight on this authority.

D. Sanctions and Leniency Policy:

Generally, ECL regulates and set forth the sanctions and penalties applicable for the infringement of its provisions. For the purpose of this Article, more details about the sanctions imposed for violations of the merger control regime are discussed in Section IV below.

It is worth mentioning that ECL does not only foresee fines for the offender company, but also to the individuals responsible for the actual management of the enterprise, when they had an actual knowledge of the violation, or if a failure in performing their management duties contributed to the breaching conduct.

In 2014, ECL was amended to introduce leniency procedures in cartel cases. According to Article 26 of the ECL, the first person to report a Cartel Violation (first whistleblower), could be exempted from both the criminal prosecution and the applicable fines. In addition, subsequent whistleblowers reporting the same Cartel Violation may benefit from partial amnesty from the applicable sanctions. In particular, if other participants involved in a Cartel Violation decide to voluntarily cooperate with the ECA after the initial whistleblower reports the issue, they may still face prosecution. However, if they are convicted, they may only have to pay half of the applicable fine. This reduced punishment is only given if the court decides that their testimony was helpful in exposing the details of the Cartel Violation or proving the conduct in question.

It is worth mentioning that the ECA has the authority to provide amnesty for criminal liability associated with a Cartel Violation, but not for any potential civil liability under Egyptian law. As a result, the whistleblowers who successfully received full or partial amnesty, may still face civil claims filed by third parties alleging damages from the harmful effect of the conduct of the Cartel Violation.

On June 28, 2020, ECA issued its first guidelines for this leniency policy (for more details about ECA's leniency policy and its relevant procedures, please see White & Case's article: "Egypt Launches Cartel Amnesty Guidelines"[9]).

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7 See Article 17 of the Executive Regulations.

8 See Article 16 of the Executive Regulations.

9 https://www.whitecase.com/insight-alert/egypt-launches-cartel-amnesty-guidelines#:~:text=The%20Egyptian%20Law%20on%20Protection%20of%20Competition%20and,reporting%20the%20same%20conduct%20%28%22%20Leniency%20Policy%20%22%29.

III. THE PRIMARY REGULATOR OF THE COMPETITION LAW AND ITS MAIN ENFORCEMENT POWERS

As it was mentioned above, ECA is the main ECL enforcer. It is affiliated with the Prime Minister and managed by a Board of Directors whose members are appointed by the Prime Minister for a four-year term (subject to renewal for another term). The ECA's Board of Directors is headed by a Chair also designated and appointed by the Prime Minister.

The ECA has a broad range of enforcement powers. These include, inter alia, investigating complaints of violations of the ECL, initiating ex-officio investigations of practices that may constitute a threat to competition or result in violation of the Competition Law, assessing ex-ante notifications of economic concentration[10], providing advisory opinions on draft laws and decrees that may harm competition, promulgating periodic reports on ECA's activities and actions, and organizing training programs to raise awareness of the law and regulations.

In addition, the ECA is empowered to issue cease-and-desist orders to temporarily suspend any practice that would constitute a violation of ECL (provided that such practice would lead to irreparable harm to competition or consumers[11]). These cease-and-desist orders can be challenged before competent administrative courts[12].

Also, the ECA is the sole authority that has the power to file criminal action regarding violations of the ECL's provisions. Criminal cases arising from violation of ECL can only be initiated based on a request from the Chair of the ECA. Thus, the public prosecution cannot file a criminal lawsuit unless the ECA so requests. Once ECA decides to incriminate a prohibited practice, it refers the case to the public prosecution which, in turn, conduct its own investigations into the case. Finally, the public prosecution refers the case to the economic courts[13].

Finally, ECA has the power to settle violations of ECL based on approval of majority of ECA's Board of Directors[14].

IV. THE MERGER CONTROL REGIME IN EGYPT PRIOR TO THE ENACTMENT OF THE RECENT AMENDMENT: EX-POST NOTIFICATION REGIME

Prior to the Recent Amendments, the competition legal regime in Egypt did not include ex-ante merger control. The ECL only used to impose a duty on merging parties to notify ECA within 30 days after the transaction giving place to the concentration has been closed[15]. Article 19 of this Law dictated that parties

10 The Recent Amendments added such ex-ante control regime to the ECL (as discussed in Section IV of this Article).

11 See Article 20 of the ECL.

12 Administrative courts in Egypt have jurisdictions over all administrative decisions issued by administrative bodies (including ECA). They are competent in reviewing the decisions made by an administrative entity. Such decisions are considered administrative decisions. Thus, claims to stop the execution or to annul a decision issued by ECA fall under the jurisdiction of administrative courts.

13 Economic courts are specialized courts established by Law No.120 of 2008. ECL is one of the laws that fall under the jurisdiction of the economic courts. Thus, cases concerning violations of ECL are referred to and adjudicated by the economic courts. These courts are composed of judges with commercial law background.

14 See Article 21 of ECL.

15 According to Article 19 of the original ECL text, a control acquisition subjected to be reported could take in any of the following forms: any acquisition of assets, proprietary rights, usufruct, shares or establishment of unions, mergers, acquisitions, or joint management of two or more persons.

undergoing such operations must notify ECA if their combined turnover in Egypt in the most recent financial year exceeded 100 million EGP (approximately 323 million and 641 thousand USD).

It is worth noting that the Recent Amendments repealed the second paragraph of Article 19 which regulated the post-merger notification obligation. Only the first paragraph of Article 19 was not affected by the Recent Amendments. The current text of Article 19 (i.e., the first paragraph of the old text) provides that "any person may report to the ECA any violation of any provisions of the ECA". As a result, the current text of Article 19 no longer includes any reference to the post-merger notification obligation.

Although the ECL mandated notifying ECA after completing a transaction, the ECA was not authorized to approve the transactions before or after their completion (i.e., ECA could not control the transactions). It is also worth noting that the ECL and its Executive Regulations were silent on organizing the actions that the ECA could take in response to a post-merger notification. The ECL only included the obligation to file a notification, the procedures, data and documents required for filing, and the sanctions imposed on the concerned parties for failure to notify the ECA of a transaction within the timeline prescribed in the ECL and its Executive Regulations.

A. The sanctions for not filing the post-merger notification

Failure to notify ECA of the merger transaction may result in payment of a fine that ranges between 20,000 and 500,000 Egyptian pounds (approximately between 647 USD and 16 thousand USD).

B. How ECA controlled merger transactions using its powers prior to the adoption of the Recent Amendments

ECA did not wait for the adoption of the Recent Amendments to control mergers that would result in anticompetitive effects. Under the old post-closing notification regime, ECA used the powers invested in it to monitor mergers and investigate transactions with anticompetitive effects (for more details on this, please see White & Case's article: "Egypt's Competition Authority Seeks Active Merger Control")[16]. Although ECA did not have the power to approve or block a merger transaction prior to its closing moment, the agency relied on its cease-and-desist power to stop mergers between rivals until it investigates the transaction and approves it.

Under its approach to have control over merger transactions before closing thereof, ECA relied primarily on Article 6 of the ECL. As it was mentioned above, this Article prohibits the horizontal agreements between rivals in any relevant market if such agreements would lead to, *inter alia*, increasing, decreasing, or fixing prices of underlying products; or restricting the production, distribution or marketing operations of any relevant product. ECA's power to investigate proposed merger transactions was based on its view that such merger would imply anticompetitive agreements if they would result in increasing, decreasing or fixing the prices of the relevant product or restricting its production or distribution.

Article 6 of ECL has two parts: the first part regulates the prohibition of horizontal agreements between rivals, and the second grants ECA the discretionary power to exempt some agreements/transactions from such prohibition. This exemption is permitted if ECA finds out that the agreement will achieve economic efficiency by attaining benefits to the consumers that outweigh the effects of restricting the freedom of

16 https://www.whitecase.com/insight-alert/egypts-competition-authority-seeks-active-merger-control

competition in the marketplace. Therefore, in cases where ECA relied on the prohibition stated in Article 6 to investigate a merger transaction, it also used the exemption permitted under the same Article to approve the transaction if the investigations revealed that the transaction achieves economic efficiency.

C. The well-known case of Uber and Careem merger and the Role Played by ECA[17]

Uber Technologies Inc. (or Uber) is a ride-hailing company offering many services like peer to peer ridesharing, ride service hailing, food delivery, etc. As of 2019, it was estimated that Uber had more than 100 million users worldwide and was operating in approximately 63 countries.

On the other hand, Careem is a ride-hailing company based in Dubai. Careem started as a pioneer of the Middle East's ride-hailing economy. Today, this company is the region's everyday Super App operational in 13 countries and over 100 cities. In January 2020, Careem became a wholly-owned subsidiary of Uber Technologies, Inc.

Uber and Careem were the main dominants and primary rivals in ride-hailing market in Egypt. In the last quarter of 2018, ECA learned about Uber's proposed transaction to acquire Careem. The transaction was not closed, and thus no notification was required to be filed before ECA, according to Article 19 of the ECL (before the enactment of the Recent Amendments).

However, ECA issued a cease-and-desist order[18] to suspend the acquisition transaction between Uber and Careem. Pursuant to this cease-and-desist order, ECA obliged both parties to: (a) notify ECA prior to the conclusion of any agreement between the parties with respect to the control acquisition transaction; (b) submit to ECA all documents and data related to such proposed agreement and the parties' respective shares in ride-hailing market; and (c) obtain ECA's approval of the proposed agreement before its conclusion according to Article 6 of the ECL.

The Authority based the above-mentioned procedures on two primary Articles of ECL: Articles 20 and 6. It issued the cease-and-desist order because it has the power to enact those orders to temporarily suspend any practice that would lead to an irreparable harm to competition or consumers. In ECA's assessment, Uber's proposed acquisition of Careem, if occurred, may likely result in substantial harm to the competition and the consumers because both parties were the sole rivals in the ride-hailing market in Egypt.

The authority also relied on Article 6 of ECL in its decisions. In the Authority's interpretation, Article 6 applies to all horizontal agreements between rivals if such agreements would lead to, *inter alia*, increasing, decreasing, or fixing prices of underlying products; or restricting the production, distribution or marketing operations of any relevant product. ECA utilized the broad language of Article 6 and concluded that it applies to all agreements that will have such anticompetitive effects irrespective of the type or form of the agreement. Thus, it decided that the proposed agreement of acquiring Careem is an agreement between two rivals (i.e., Uber and Careem). It also decided that such agreement may likely result in increasing the prices of ride-hailing services in Egypt and restrict the production and distribution of such services because, as a result of the transaction, Egypt ride-hailing market would be dominated by Uber, with no companies that can exercise a competitive pressure over it.

17 https://www.whitecase.com/insight-alert/egypts-competition-authority-seeks-active-merger-control

18 ECA's cease-and-desist order was issued by virtue of its decree No. 26 of 2018 on October, 2018. For more details, please see https://africanantitrust.com/category/egypt/

It is worth mentioning that Uber and Careem were not based in Egypt. However, as clarified above, ECL applies to acts committed abroad when they lead to the prevention, restriction or harmful effects over competition in Egypt.

In compliance with ECA's cease-and-desist order, both Uber and Careem filed a notification with ECA requesting the exemption of the acquisition agreement from the prohibition of Article 6. After months of investigations and negotiations, the authority approved the acquisition of 100% of Careem shares on December 29, 2019[19].

The agency's approval was conditional upon a series of commitments Uber had made to ECA. These include commitments related to capping increase of prices of fares, maintaining the driver utilization rate on "Uber X" and "Careem GO" Egypt-wide within a 60-80% range, using best effort to maintain a high degree of innovation and service quality, and removing exclusivity agreements with partners of Careem and Uber in Egypt to reduce barriers of entry for the new competitors (for more details about these commitments: please see ECA's Executive Summary on Assessment of the Acquisition of Careem, Inc. by Uber Technologies, Inc.[20]). The purpose of such commitments was to limit any harmful effects that the acquisition transaction would have had on competition (for more details about Uber and Careem transaction, please see Reuters article: "Uber buys rival Careem in $3.1 billion deal to dominate ride-hailing in Middle East"[21]).

The case of Uber and Careem is very illustrative regarding ECA's approach under the old post-merger notification regime to control and investigate the merger transactions. The Authority aggressively used all the relevant powers it had to investigate the proposed transaction between Uber and Careem to assess its effects on competition. This case demonstrates that ECA was actively utilizing its enforcement powers to protect competition and prevent harming the consumers in ride-hailing market in Egypt.

V. THE MERGER CONTROL REGIME IN EGYPT POST ADOPTION OF THE RECENT AMENDMENTS: EX-ANTE MERGER APPROVAL REGIME

Since the enactment of the ECL in 2005, ECA sought several times to amend it to include explicit provisions governing the merger transactions in order to convert the post-merger notification regime into a pre-merger control regime. It was an ordeal. The Authority had to discuss and debate with the government to achieve its goals, and finally, on December 6, 2022, the House of Representatives approved the proposal amendment, which was ratified by the Egyptian President on December 29, 2022, and published in the Official Gazette.

It is worth highlighting that ECL's Executive Regulations have not been modified yet to reflect the Recent Amendments. The Recent Amendments were supposed to enter into force on the next day following their publication in the Official Gazette[22]. However, on January 4, 2023, the Authority published a press release stating that some provisions of the Recent Amendments will not be effectively enforced except upon issuance of the amended Executive Regulations. The Authority mentioned that the enactment of the amended Executive Regulations is essential in order to ensure the effective enforcement of the Recent Amendments,

19 ECA's approval was issued by virtue of its decree No. 45 of 2019 on December 29, 2019.

20 https://www.docdroid.net/iGV8t5W/executive-summary-ecas-assessment-of-the-acquisition-of-careem-inc-by-uber-technologies-inc-non-confidential2-pdf#page=15

21 https://www.reuters.com/article/us-careem-m-a-uber-idUSKCN1R70IM.

22 According to Article 4 of the law No. 175 of 2022, the law comes into force on the next day following its publication in the Official Gazette (i.e., December 30, 2022).

given that the Executive Regulations will determine some key aspects of the Recent Amendments[23]. For instance, the Executive Regulations will provide a detailed explanation on how to calculate the combined turnover and consolidated assets of the concerned parties (as mentioned below); in-depth description of the exact procedures to file for pre-closing clearance; and details about the documents that must be submitted to the ECA in connection with the filing process.

A. Key Features of the New Merger Control Regime

The Recent Amendments made major changes to the merger control regime under the ECL. They added new Articles to the ECL[24], in addition to replacing and modifying some.

The Recent Amendments impose a strict obligation on the merging parties to obtain a pre-closing clearance form ECA when the transaction constitutes an "Economic Concentration" (as defined in further details below) that exceeds the turnover thresholds prescribed in the ECL for notifiable concentration[25] (the "**Filing Obligation**").

In addition, the current merger control regime grants ECA the power to investigate, ex-post, any merger transaction that resulted in "Economic Concentration" even if it falls below the notifiable turnover thresholds. This allows the authority to investigate in an ex-post manner, any transaction that could harm competition in the agency's opinion. The post-merger investigation shall be initiated upon approval of ECA's Board of Directors, within one year from closing date of the merger transaction[26].

B. The Concept of "Economic Concentration"

The Recent Amendments defines the "Economic Concentration" as any change of control or material influence in one or more persons that results from: (a) a merger; (b) acquisition, directly or indirectly, of control or material influence in another person; or (c) the establishment of a joint venture or the acquisition of an existing entity for the purpose of establishing a joint venture engaging in an economic activity independently and continuously[27].

For the purpose of understating the concept of the "Economic Concentration" under the Recent Amendments, it is important to note how they define the concepts of "Change of Control" and "Material Influence":

- Change of Control: the ability of the controlling person or persons to effectively influence the economic decisions of another person or persons directly or indirectly[28].
- *Material Influence*: the ability to, directly or indirectly, influence the policies of another person; including affecting this person's strategic decisions or commercial objectives[29].

23 http://www.eca.org.eg/ECA/News/View.aspx

24 For example: the Recent Amendments added to the ECL Articles 19 bis, 19 bis a, 19 bis b, 19 bis c, 19 bis d, 19 bis e, and 19 bis f.

25 See Articles 19 bis and 19 bis a of the ECL.

26 See Article 19 bis of the ECL.

27 See Article 2 (g) of the ECL.

28 See Article 2 (h) of the ECL.

29 See Article 2 (i) of the ECL.

It is important to highlight that the Recent Amendments explicitly exclude some transactions from the definition of "Economic Concentration", for example, corporate restructuring transactions that do not involve, direct or indirect, change of control or material influence. Also, the temporary acquisition by financial securities firms of financial securities may be excluded if the acquisition is made for the purpose of reselling securities within one year of acquiring them; subject to fulfillment of other conditions[30].

C. The Turnover Thresholds Triggering the Filing Obligation

Under the Recent Amendments, the duty to report is triggered when the transaction, that constitutes an "Economic Concentration", exceeds any of the following thresholds[31]:

(a) The combined annual turnover or consolidated assets of all concerned parties in **Egypt** exceeds 900 million Egyptian Pounds (approximately 29 million and 121 thousand USD) in the most recent fiscal year, and the turnover of at least two of the concerned parties exceeds 200 million Egyptian Pounds (approximately 6 million and 472 thousand USD) each in **Egypt** during the most recent fiscal year; or

(b) The combined turnover or consolidated assets of all parties **worldwide** exceeds 7.5 billion Egyptian Pounds (approximately 242 million and 722 thousand USD) in the most recent fiscal year, and the turnover in **Egypt** of at least one party exceeds 200 million Egyptian Pounds during the most recent fiscal year.

As mentioned above, the Executive Regulations will provide a detailed explanation on how to calculate the combined turnover and consolidated assets of the concerned parties.

D. ECA's Review Process of the Economic Concentration

ECA's review process of an Economic Concentration includes two phases. First, upon receipt of proper notification of a transaction, the agency will start an initial review period of 30 working days to decide whether the proposed transaction would result in limiting, restricting, or harming the competition[32]. This initial term is subject to extension by 15 working days.

After this review, ECA's designated committees will issue one of the following decisions:

1- Authority's lack of jurisdiction;

2- dismissal of the notification (if the concerned parties decide not to cancel the transaction);

3- conditional approval;

4- unconditional approval; or

5- referral to the second phase of review (in case the initial review concluded that the transaction raises serious doubts as to limiting, restricting or harming competition).

30 See https://www.lexology.com/library/detail.aspx?g=ad450511-5481-4c0a-a362-998e834c6d83

31 See Article 19 bis of the ECL.

32 See Article 19 bis c of the ECL.

If the transaction is referred to a second phase review, ECA will have 60 working days from the referral decision to continue the assessment process. This period is also subject to extension by 15 working days.

Following the authority's second phase review, it will either dismiss the notification (if the concerned parties decide not to cancel the transaction), approve the transaction subject to some conditions, approve the transaction unconditionally, or reject the transaction.

It is worth noting that if ECA fails to issue any decisions within the timelines mentioned above, the merging parties have the clearance to go on and close the transaction.

According to the statements of Dr. Amir Nabil, the former Chairman of the Egyptian Authority, commenting on the Recent Amendments, the timelines provided by the Recent Amendments for ECA's review process can be very tricky and raise some concerns.

These timelines are strict and inflexible and this may hinder ECA's capacity for conducting a proper review. For example, examining transactions of Economic Concentration may likely involve some complexities that need time to be well evaluated and assessed. Further, ECA may, during the review process, request further information or documents from the concerned parties that are crucial for this process. The Recent Amendments provides rigid timelines and if ECA does not issue its decision within the timelines, this will be taken as approval. Thus, it has to be seen, how ECA will deal with such circumstances affecting the duration of the review process and requiring longer review period.

Therefore, ECA may consider revisiting the duration of the review process to have some flexibility in the process. The necessity of revisiting such durations may appear in the future as part of the practical issues and implications of applying the new merger control regime (for more details about Dr. Amir Nabil's statements in this regard, please see his article published on Competition Policy International organization's webpage: The New Egyptian Merger Control Regime: A Former Enforcer's Perspective[33]).

E. Special Review Regime for Transactions that are Subject to Jurisdiction of Financial Regulatory Authority

The Recent Amendments introduced a special regime for reviewing the Economic Concentration transactions in activities that fall under the jurisdiction of the Financial Regulatory Authority (**"FRA"**). Article 19 bis (e) of the ECL excluded the activities that are subject to the supervision of the FRA from the jurisdiction of ECA. The parties to such transactions are obliged to report FRA, not ECA, the proposed transaction to obtain a pre-closing clearance. However, FRA must seek the opinion of the ECA prior to granting its approval[34]. Thus, the Competition Authority's role in such transactions is ancillary. Upon the reception of notification from FRA, ECA will have 30 to review the operation and issue its non-binding opinion of either lack of jurisdiction, dismissal, approval or rejection.

According to Dr. Amir Nabil's statements, this review structure raises uncertainty about the review process of the transactions involving activities that fall under the supervision of the FRA. For example, the Recent Amendments do not clearly define the activities that fall under FRA's jurisdiction. In addition, limiting the role of ECA in such transactions to the issuance of an advisory opinion may be a loophole on which the concerned parties may rely to avoid ECA's binding jurisdiction (for more details about Dr. Amir Nabil's statements on this regard, please see his article: The New Egyptian Merger Control Regime: A Former Enforcer's Perspective[35]).

33 https://www.competitionpolicyinternational.com/the-new-egyptian-merger-control-regime-a-former-enforcers-perspective/#_ftn1

34 See Article 19 bis f of ECL.

35 Ibid.

F. Gun Jumping Penalties

The Recent Amendments introduce new fines specifically for the violation of the pre-merger control regime. According to Article 22 bis (d), the parties who fail to notify ECA of a notifiable transaction would be subject to a fine of at least 10% of either (a) the total annual turnover or consolidated assets; or (b) the value of the notifiable transaction (whichever is higher). If it is not possible to calculate the total annual turnover, consolidated assets or the value of the transaction, the fine will be a fixed amount of not less than 30 million Egyptian Pounds (approximately 971 thousand USD) and not more than 500 million Egyptian Pounds (approximately 16 million and 180 thousand USD). These fines also apply to any person who commits any following violations:

(a) Failure to comply with ECA's decision that conditionally approves a transaction; and

(b) Obtaining a clearance from ECA, whether in the initial or second review phases, upon knowingly submitting false information or documents.

VI. CONCLUSION

The Recent Amendments mark a significant step in the long-awaited overhaul of the Egyptian anticompetition and merger control regimes.

Before the enactment of the Recent Amendments, Egypt was one of the few countries in the world whose competition law was not adopting pre-merger approval system. Now, this is no longer the case in Egypt after the enactment of the Recent Amendments as they will result in market changes and affect some of the economic and commercial decisions of the investors.

ECA has been seeking an active role in merger control even when it did not explicitly have the power to review merger transactions before the closing. However, it is currently waiting for the issuance of ECL's amended Executive Regulations to have in-depth guidelines for the implementation of the new merger control regime. Until the issuance of the amended Executive Regulations, ECA may partially hold the implementation of the new merger control regime. However, it is not yet clear how the agency will deal with any notifiable transactions until the issuance of the Executive Regulations.

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