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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Egypt

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INDEPENDENCE OF THE EGYPTIAN COMPETITION AUTHORITIES - FROM DESIGN TO PRACTICE

-- Egypt --

1. In 2005, Egypt adopted its first competition law following a long legislative process. The Competition Law Act established for the first time an Egyptian Competition Authority in Egypt. Over the past 11 years, the independence of the Egyptian Competition Authority (ECA) has witnessed some changes that took place through the consecutive legislative amendments.

2. In this paper we will highlight the main changes that took place in the Egyptian Competition Authority's formation, competences, and independence. We will highlight as well some of the expected amendments to be submitted to the competent authorities in order to increase the independence of ECA and foster better enforcement of competition law and policy in Egypt.

1. Introduction

3. The Egyptian Competition Authority was established in 2006, one year after the adoption of the Law number 3 for the year 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter the Competition Law Act). Located in Cairo, the ECA is affiliated to the Prime Minister – who delegated his powers to the Minister of Trade and Industry – and enjoys the status of a public juristic personality.

4. ECA has an independent budget similar to the model of public service authorities, composed of appropriations designed in the State General Budget. Additionally, the budget is supplied with grants, donations and other resources accepted by the Board of Directors as well as revenues from fees payable to the ECA for the services it renders.

5. With regard to its activities, the ECA remains accountable to the Prime Minister of Egypt (delegated the Ministry of Trade and Industry) and is under obligation to present annual reports to the Parliament.

6. The relationship with the Competent Minister is sufficiently distant provided that, as a body with public juristic personality, ECA can take actions against other governmental bodies and has an individual standing in debates before the Parliament. However, a practical impediment for ECA; is the administrative procedural affiliation, which makes it difficult to hire qualified personnel, in addition to limiting the usage of outside experts. A matter that might need to be enhanced in the near future.

7. Decisions of the ECA are taken – on the basis of a majority vote – by the Board of Directors, the body responsible for managing the ECA. The board is currently composed of the Chairperson and 14 members who perform their tasks on the basis of the relevant Decree on the formation of the Board of Directors. Although its provisions are not fully in line with the recently amended Competition Act, this decree is supposed to stay in force until November 2017, which corresponds to the date of expiry of the Boards' term in office. Accordingly, together with the Chairperson and a Counselor from the State Council, the Board is composed of further 4 members representing the concerned ministries, 6 members

representing Federations and Unions as well as 3 experts/specialists. All board members are inviolable and can be revoked only in particular circumstances.

8. The Board is the central administrative and decision-making body of the ECA with extensive competencies, but without the competence to impose fines for the violation of competition rules, which fall in the exclusive competence of the “economic courts”.

9. The Board has the powers to take any actions and to adopt decisions on the initiation of procedures in the scope of antitrust (Article 11), to establish violations of antitrust rules and to order the violator to readjust his position and to redress the violation (Article 20). According to Article 20, the Board issues decisions to stop the established prohibited anticompetitive practices, requests the initiation of lawsuits by the economic court and has the power to settle competition cases. Moreover, at all stages of the procedure before the ECA and the economic courts, the Board has the power to grant leniency from fines by abstaining from requesting the initiation of criminal lawsuits against applicants, Article 26 of the Competition Act.

10. As the management body, the Board drafts regulations with regard to the organization of the work within ECA and sets out the financial and administrative rules pertaining to its employees (Article 15). It recommends employees to be granted the status of law enforcement officers, giving them extensive powers of investigation including the right to review records and documents as well as to obtain information and data from governmental and non-governmental bodies (Article 17).

11. The ECA is represented by a Chairperson with distinguished expertise and appointed for a renewable term of four years. As part of the board, the Chairperson has administrative functions in the scope of coordination and supervision of the ECA’s activities.

2. Latest Amendments in the Law and Increasing the Independence of ECA

12. Major developments in Egyptian competition law occurred in 2014: The new Constitution promulgated in January 2014 for the first time expressly highlights the importance of competition for the Egyptian economy (Article 27) and grants legal personality as well as technical, financial and administrative independence to autonomous organizations, with the ECA not expressly mentioned, but being believed to be one of those.

13. At the same time, an amendment to the Competition Act entered into force on July 3, 2014. The amended Act has amended almost 60% of the existing law, it is deemed to grant a wider independence to the ECA, inter alia, by reducing the total number of board members from 15 to 10¹. Hence, the influence of specialists and experts within the Board is reinforced, whereas the influence of government representatives and interest groups has been reduced.

14. Moreover, the Chairperson is competent for appointing a full-time Executive Director of the ECA for a term of office of two years. Since 2014, this task is no longer assigned to the Prime Minister (and, hence, the competent Minister of Trade and Industry to whom this competence had been previously delegated).

¹ After the expiry of the Decree on the Formation of the Board of Directors and, in consequence, the end of their term in office in November 2017, the number of members representing the concerned ministries will be reduced from now 4 to 2, whereas representatives of the Banking Federation, the General Federation for Civil Associations and the Egyptian General Union of Labour will be no longer part of the Board.

15. Before 2014, the Competition Law Act had to be implemented through a decree from the Competent Minister. A major amendment was that it is now for the Board of Directors to initiate lawsuits in cases of violations of the Competition Law without referring the matter to the Competent Minister². The Authority can at its own initiative start procedures of inquiry, inspections, or fact finding missions. Originally (i.e. before the Law was amended in 2014) the role of the Competition Authority stopped there: it could not initiate criminal lawsuits or start a procedure in case of a violation of the provisions of the Law (ex Article 21). Criminal procedures could only be initiated at the request of the competent Minister or the person delegated by him. The competent Minister or his delegate could then also settle any dispute with regard to any violation to the Law before a final judgment was rendered. This settlement was considered a waiver of the criminal lawsuit-filing request and would result in the lapse of the criminal lawsuit. The Authority could not interfere with such settlement. In other words, the Competition Authority could only refer its decisions following its investigations to the competent Minister, who had the exclusive right by virtue of the Law to request in writing the initiation of a criminal lawsuit by the public prosecution.

16. All in all, before the amendment of 2014, the enforcement of the Competition Law was in the hands of the Competent Minister. Even when the Competition Authority investigated and found a violation of the Competition Law, it could neither impose a sanction nor refer the issue to the public prosecution to take action. The matter had to be referred to the competent Minister who had absolute power to decide whether to initiate criminal procedures or settle the case. Following the amendment of 2014, the Board of Directors of the Competition Authority was given the competences that previously were granted to the Minister. The Board of Directors (with a majority of votes) can now initiate criminal proceedings in case of a violation of the Competition Law Act. The Board of Directors can also settle these disputes and the settlement will be considered as a waiver of the criminal lawsuit (current Article 21). The Board is now entitled to settle cases during the entire procedure and, hence, even after a criminal lawsuit has been initiated before the courts. It retains this power until a judgment is pronounced. The 2014 amendments went even further to promote the independence of ECA by the immunization of ECA's Board members from being revoked except for the case of resignation or being convicted in a crime or serious misdemeanor by virtue of a final judgment (Article 12).

17. Furthermore, the Competition Authority can also issue by itself opinions on the legislations, policies, or decisions related to competition. The competent authorities are obliged to take the opinion of the Competition Authority on draft laws or regulations related to competition (Article 11(5)).

18. Another important amendment to the law is that the Board shall not initiate the criminal lawsuit against the first violator who takes the initiative to inform ECA of the offence and submits the supporting evidence that shall contribute to disclosing and establishing the elements of the offense. This is the first time that a full leniency program is applied through ECA. These big authorities to initiate lawsuits, settle them, and evaluate the provided evidences in case of leniency, prove the standing of the ECA as a truly independent competition authority.

19. It is worth mentioning that such strong independence of the Competition Authority following the 2014 amendments is met by a lot of obligations on its part; specifically, the Competition Authority is accountable for its acts and has to submit an annual report to the Parliament. It also has to be acting in a transparent way, which explains the current efforts of the Authority to adopt guidelines in the different aspects of competition law.

² Article 21 of Law No. 56 for the year 2014, amending the Competition Law Act, Official Gazette, Issuance no. 25(H) Dated 2 July 2014. Before this amendment, the Board of Directors could only refer the matter to the Competent Minister and it was for him/her to decide whether to refer the case to the public prosecution or not.

3. Expected Amendments to the Law and its Effect on the Independence of ECA

20. Although Egypt has gone through big changes following the adoption of the competition law in 2005 (followed by its amendments as indicated *supra*), there are some aspects that still needs enhancement, some of which are related directly to the independence of ECA and a better enforcement of the Competition Law.

21. In the current period, ECA staff is working to submit further amendments of the Competition Law to the Parliament, amendments that will grant more independence to ECA and better enforcement of the Competition Law.

22. We will highlight here two of the main aspects of expected amendments, namely, the introduction of an effective merger control mechanism, and establishing a specialized judiciary or a quasi judicial committee:

23. First: The Competition Law in Egypt covers two main aspects of competition matters, namely, prohibiting anticompetitive agreements and prohibiting abuse of dominant position. When it comes to prohibiting anticompetitive mergers, the Law is silent and has only a requirement to notify mergers to ECA after they are concluded. The Law does not grant ECA the right to investigate mergers, it does not include any substantive test, procedural framework, or the right to block mergers in case they harm competition in the market.

24. The current Competition Law Act imposes only a notification obligation. The notification is simply informative. It does not entail the application of a substantive test or an ex-ante clearance from ECA and, more importantly, there is no legal ground for prohibiting a merger. Moreover, the information ECA receives does not seem to lead to an effective ex-post check of the competitive situation.

25. ECA is currently working on introducing a merger control mechanism that shall organize mergers in the market and more particularly the right of ECA to object to some mergers when they might harm competition in the market. With introducing a merger control mechanism in the Competition Law, ECA will have jurisdiction over the three aspects of competition matters (anticompetitive agreements, abuse of dominance and anticompetitive mergers). This should have positive effects on enforcing competition and enhancing the markets. It will allow ECA to coordinate its efforts with other sectorial Authorities that have jurisdiction over mergers, allowing ECA to be the only authority to consider the competition aspects of mergers and acquisitions, and that its decisions are binding to those other sectorial Authorities.

26. Second: Currently, ECA has only the power to issue administrative decisions but it cannot impose sanctions alone. Its decisions can be enforced through court proceedings, which are long, expensive and complicated. The courts, unlike the competition authority, do not necessarily have the knowledge and expertise to apply the competition law based on the economic analysis that the Competition Authority adopts.

27. Introducing a specialized judiciary having competences over enforcing competition matters is a critical amendment that will without doubt enhance the enforcement of competition law in the country.

28. Currently, ECA Board of Directors in case of a violation to the Competition Law has the authority to refer the matter to the Public Prosecution; the Board has no power to impose any sanctions on the violating firms. The Public Prosecution will then have full jurisdiction over the matter, it will investigate the violations, interrogate witnesses, request further data if needed, and assess whether the violation needs to be referred to the Court or not. If the Public Prosecution decided to refer the matter to the Court, the Court will in turn have full jurisdiction over the matter, it can request further information,

interrogate witnesses, and assess the violation. The Court can then either issue a decision based on the merits with conviction or acquittal. In case of conviction, the convicted party has the right to appeal the decision in front of the Court of Appeal, where the decision of the court of appeal will be final.

29. This very lengthy process to reach a final conviction decision takes a very long time, it also risks that non-specialized public prosecutors and judges are deciding on competition matters. This represents an enforcement impediment and a challenge to the effective application of Competition Law in Egypt.

30. Establishing a specialized judicial committee³ having jurisdiction over competition matters and allowing an appeal from its decisions in front of the courts is a suggestion currently being prepared by ECA.

31. This judicial committee shall have competence over competition law matters, it shall issue final decisions that can be appealed in front of specialized chambers to be established in the Court of Appeal or the Supreme Administrative Court of the State Council. The composition of such committee should be from judges, economists, and experts in the field.

32. This model entails eliminating the role of the Public Prosecution and criminal chambers of the Courts. The Competition Authority will issue recommendations directly to the specialized judicial committee, which will issue in turn binding decisions with acquittal or conviction. Adopting such a mechanism will be considered a big step in speeding up the procedures towards better enforcement of the Competition Law.

³ This is already adopted under the Capital Market law no. 95 for the year 1995, where a committee was established to look into the decisions issued by the minister of investment to hear appeals in decisions issued by the Public Authority for Monetary Surveillance. Also, under the Consumer Protection Law.