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Criminalisation of cartels and bid rigging conspiracies – Note by Egypt

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<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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1. Introduction

1. Cartels are prohibited and severely sanctioned under the Egyptian Competition Law (“ECL”), they are considered unfair practices that only aim to restrict competition and harm consumers.¹ Bid rigging similarly harms the public interest, since it deprives the government from having the most competitive offers in terms of prices and quality for essential products. Cartels, including bid rigging, are considered criminal offences under ECL, the Egyptian Competition Authority (“ECA”) is mainly responsible for their enforcement².
2. Accordingly, this paper will discuss how ECA is able to ensure effective criminal enforcement against cartels, specifically bid rigging. This paper will thus first tackle the enforcement tools of the ECL, then the substantive rules of bid rigging under ECL, and lastly the additional Egyptian legislations that ensure greater criminal enforcement against bid rigging.

2. Overview on the enforcement of ECL

3. In order to ensure the effectiveness of the enforcement of ECL vis-à-vis cartels and alternative anti-competitive practices, the criminal and administrative rules set forth in the ECL empower ECA and its employees with the necessary investigation tools that support in facilitating the detection of any violation including bid rigging offences. In addition, ECL gives ECA decision-making powers in order to detect and cease the anti-competitive practices.

2.1. Investigation tools

4. ECA conducts investigations upon a complaint filed or its own initiation. ECA can receive complaints from any concerned party regarding any anti-competitive practice in the market. Alternatively, it may start investigations on its own initiative whenever the market monitoring department reveals potential concerns or violations.³
5. **ECA employees are law enforcement officers.** Article 17 ECL states that the employees of ECA, who are determined by a decision issued by the Minister of Justice in agreement with the competent minister, shall have the status of law enforcement officers in applying the provisions of ECL. ECA employees are granted this status to assist them in carrying out investigations accurately. This includes requesting required data from market players necessary for investigations (through data requests or dawn raids) and holding hearing sessions with any individuals who can assist with collecting information.
6. **ECA has the right to organize dawn raids on both private and public entities.** Dawn raids are an effective tool used by competition authorities to detect and prove anti-

¹ Court of cassation, Cement Cartel, no 4801/3k, 21 June 2009; Economic Court, 2nd chamber economic misdemeanors, Pharmaceutical Distribution Cartel, no 1898/2016, 28 February 2018.

² It should be noted that all infringements to ECL are considered as criminal offences.

³ Articles 11(1) and 11(3) ECL.

competitive behavior, especially cartels. The ECL endows ECA's employees with the right to review records and documents and to obtain any information or data from any governmental or non-governmental entity for the purpose of detecting and investigating cases that are being examined by the Authority.

7. ECA has recently increased the number of dawn raids carried out. . In all dawn raids, ECA employees are accompanied by police forces to ensure cooperation by raided companies or individuals and their employees., ECA has concluded a total of 35 dawn raids, since its establishment. The most recent dawn raids were namely concerning the heart valves case (discussed below) and the cement case. These dawn raids were carried out in the premises of private entities, as well as in the premises of several commercial chambers, ministries, and other types of governmental bodies. ECA was successful in detecting a number of cartels as a result of these dawn raids.
8. **Role of leniency in detecting horizontal agreements.** In order to facilitate the detection of ECL violations, more specifically hardcore horizontal agreements, a leniency program was introduced in Article 26 ECL. This provision dictates that a criminal lawsuit will not be brought against the first person to inform ECA of an infringement, providing ECA with the necessary documents and information to disclose and prove the elements of the violation. In addition, the Economic Court may exempt the remaining violators up to half of the sanction whenever they contribute to the disclosure of the violation's elements.⁴
9. This leniency program plays a significant role in the deterrence of the market players from participating in these harmful practices. This program benefits ECA in easily detecting anti-competitive horizontal agreements. In return, such applications will advantage the applicant to avoid potential fines that could otherwise have been imposed on them. Moreover, the beneficiary of the exemption shall not be included among the violators in the request for criminal lawsuit. This is a valuable gain to the applicant, as their application will hence exempt them not only from the recommended fine, but also from the consequences arising from having a criminal history. This may, in particular, protect the company's reputation or protect it from losing a license.

2.2. ECA's decision powers and procedures

10. Since ECA is an independent administrative body, all its decisions are administrative. It has administrative power to issue decisions and take enforcement actions such as:
 - To issue finding and termination of infringement decisions, ordering infringing undertakings to cease the infringement and/or to undertake the necessary corrective measures.⁵
 - Deciding on settlements. Unlike the fining process discussed below, ECA has jurisdiction to decide on settlements. ECA's Board of Directors ("Board") can settle with regard to any violation of the provisions of ECL. ECA's settlement is

⁴ Article 26 ECL: *"In case of committing any of the crimes mentioned in Articles 6 of this Law, the criminal lawsuit shall not be initiated against the first violator who takes the initiative to inform the Authority of the offence and submits the supporting evidence that shall contribute to disclosing and establishing the elements of the offence. The Court, with regard to the rest of the violators, may exempt the violator of the half of the prescribed sanction, should he contribute to disclosing and establishing the elements of the offence at any stage of inquiry, search, inferences gathering, interrogation and trial processes.*

⁵ Article 20, paragraph 1 ECL.

considered a waiver of the criminal lawsuit filed and results in the lapse of the criminal lawsuit in question.⁶

- Issuing interim measure decisions. ECA can issue an interim measure when there is a *prima facie* violation that produces an irreversible damage to the market.⁷
11. The administrative decisions can only be challenged before the Administrative Court. As for criminal enforcement, the current sanctions for cartels and bid rigging are fines ranging from 2% to 12% of the total revenue of the product subject to the violation (calculated for the period of the violation).⁸ In the event that the aforementioned total revenue cannot be calculated, the penalty shall be a fine of not less than EGP five hundred thousand (approximately USD 32 thousand), but no more than EGP five hundred million (approximately USD 32 million)⁹. The sanction prescribed for the violation of Article 6 is the highest sanction in ECL and is imposed on the individual participants of the cartel, with a joint liability from the undertaking. However, despite them being criminal offences, cartels and bid rigging are not punishable by prison sentences.
 12. Therefore, based on the severity of the infringement, the Board, after it issues a finding and termination of infringement decision, may decide to request from the public prosecutor to initiate criminal proceedings as per Article 21, paragraph 1 ECL: “*The criminal lawsuit or any procedure taken therein shall not be initiated, in relation to acts violating the provisions of this Law, unless a written request of the Chairperson of the Authority, upon the consent of the majority of its Board members, is presented.*”
 13. The filing of the lawsuit implies that the case is transmitted to the public prosecution, which would then conduct a further phase of investigation. Afterwards, the case is transmitted to the competent criminal court. In this matter, the Egyptian system adopts a specialized court system: the Economic Court addresses the civil and criminal proceedings of 14 economic legislations, including ECL.¹⁰

3. Bid rigging in ECL

14. Horizontal agreements, including bid rigging, are prohibited by Article 6 ECL, where paragraph 1 states:

“Agreements or contracts between competing Persons, in any relevant market, are prohibited, if they should cause any of the following:

- a. Increasing, decreasing or fixing prices of products subject matter of dealings.*
- b. Dividing product markets or allocating them on ground of geographical areas, distribution centers, type of customers, goods, market shares, or seasons or periods of time.*

⁶ Article 21 ECL. It is worth mentioning that settlement decisions are not considered administrative decisions susceptible of being challenged before the administrative courts.

⁷ Article 20, paragraph 2 ECL.

⁸ Article 22 paragraph 1 ECL.

⁹ Ibid

¹⁰ For more details on the role of judiciary in the enforcement of ECL, see OECD, *Judicial Perspectives on Competition Law (Contribution of Egypt)*, 2017. Available at: [https://one.oecd.org/document/DAF/COMP/GF/WD\(2017\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2017)10/en/pdf)

c. Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.

d. Restricting processes of manufacturing, production, distribution, or marketing of goods or services. This includes restricting product type or volume or limiting the availability thereof.”

15. This article prohibits any kind of agreement between competitors and states several forms of these agreements. Including price fixing, bid rigging, market allocations based on geographical area, customers or seasons, as well as production and distribution restrictions.

16. Article 11 of the Executive Regulations also states:

“Agreements or contracts between Competing Persons in any relevant market shall be prohibited if they are intended to cause any of the following:

c) Coordination with regard to proceeding or refraining from participating in tenders, bids, practices and other procurement proposals. Existence of coordination can be established through the following:

1. Submitting identical bids, which include the agreement on common rules for the calculation of prices or the determination of the bid conditions.

2. Agreeing on the bidder, which includes an advance agreement on the person who will be awarded the tender either alternately, on geographical basis or on customer allocation basis.

3. Agreeing on submission of cover bids.

4. Agreeing on preventing a person from participating in bid submission.”

17. According to these two articles, all forms of bid rigging, such as submitting identical bids, pre-determining winners, submitting cover bids, or agreeing to prevent a person from participating in a bid are prohibited. They are considered hardcore cartels, making them *per se* violations. The Authority is not required to prove the harm of the practice on the market. In fact, the term “*if they are intended to cause*” above is interpreted so that the agreement in question does not need to effectively produce the effects mentioned in Article 6 ECL; it is sufficient that this agreement is likely to cause such effects.¹¹

18. Bid rigging, which involves anti-competitive collusion between competitors in public procurement markets, is considered one of the most harmful types of cartels. This is due to the damage it causes not only to the market and consumer, but also to the effectiveness of government spending. When bidders coordinate, it undermines the bidding process and can result in a rigged price that is higher than what might have resulted from a free market, competitive bidding process.

19. It is worth noting that bid rigging practices are difficult to detect, as they usually occur secretly between bidders. This is specifically why the Economic Court holds that there is no obligation to submit direct evidence concerning bid rigging¹² but that it is sufficient to submit some form of proof of the agreement.¹³ Such proof can include indicators regarding the presence of the bid rigging while taking into consideration the state of the market as a whole (the market specifications and barriers to entry).

¹¹ Economic Court, Decision No. 168/2018, p. 32.

¹² Economic Court, Decision No. 1898/2016 and Decision No. 168/2018, p. 32.

¹³ Economic Court, Decision No. 168/2018, p. 40

20. ECA's first bid rigging cartel decision was in 2017, where the cartel involved seven of Egypt's biggest suppliers of heart and chest valves and antioxidants for heart and chest surgeries. It was in relation to public tenders for governmental and university hospitals. The investigation included a dawn raid which enabled ECA to gather evidence that the seven companies involved agreed to submit identical commercial offers – in spite of the different origin of their products – in order to force hospitals to divide the bids among them equally. It should be noted that the public procurement regulations allow the awarding party to divide a bid among the bidders if they submit the lowest bid. Hence, if all the bidders offered the same price, the contract will be divided in equal shares among them. By agreeing among themselves to offer the same price, the companies were able to control supplies to those hospitals and increase their prices.
21. This agreement between the parties caused substantial damage to governmental and university hospitals, as it led to higher prices, which affected the purchasing power of those hospitals and consequently their ability to buy sufficient medical supplies. Consequently, on 14 July 2019, the Economic Court approved the bid rigging claims and confirmed that bid rigging is a *per se* violation. The Court fined each company EGP 500 million.

4. ECA's efforts to enhance its criminal enforcement against bid rigging

22. ECA has recently played a great role in assuring the effectiveness of the criminal enforcement of bid rigging, namely through advocacy means. ECA has cooperated with governmental bodies to modify the laws regulating public procurement as well as to improve their knowledge on bid rigging detection through establishing new bid rigging guidelines and organizing workshops.

4.1. Law amendments to the public procurement legislations

23. For better detection and enforcement of bid rigging offences, the ECA has successfully advocated for the amendment of two laws: first, ECA advocated for the amendment of the general law that regulates all matters related to public procurement as well as its executive regulations. Second, ECA advocated for the amendment of the law regulating public procurement in the field of pharmaceutical products and medical supplies. Such modifications were made to assure better cooperation between the governmental bodies concerned with these two laws and ECA, with the objective of detecting cartels organized in regard to public procurement.

4.1.1. Amendments to the Public Procurement Law

24. Concerning the law regulating public procurement in general, ECA's efforts were focused on improving the competitiveness of the procurement process through the introduction of the concept of bid rigging offences to the law and by assuring the effectiveness of such modifications by imposing sanctions on violators. ECA cooperated with the relevant governmental bodies in order to introduce these concepts in the draft of the new public procurement law.
25. Accordingly, the new Public Procurement Law No. 182/2018, which came into force in 2018, explicitly states that one of its objectives is free competition, fairness and equal opportunity. Moreover, Article 33 of the said Public Procurement Law states the following two prohibitions and obliges the relevant public bodies to notify the ECA if they occur:
 - Prohibiting the bidder and its related parties (i.e. a single economic entity) to participate in the same bid with more than one offer.

- All anti-competitive practices, including bid rigging, prohibited by ECL.
26. Article 83 of the Executive Regulations of the Public Procurement Law states that, while applying Article 33 of the Law, administrative bodies shall take into consideration the provisions of Article 5 of the Executive Regulations of the ECL, which defines the notion of related parties as being unions, economic entities, and federations; or when an entity is controlled whether directly or indirectly by the other.¹⁴
27. Further additions include Article 5 of the Executive Regulation of the Public Procurement Law, which provides a detailed provision relating to violations related to the ECL and to the obligation to notify ECA of such violations. It states that:
- “the Administrative authority shall notify the competition authority in case of existence of an agreement, contract, direct or indirect exchange of information, cooperation through third parties whether between any employee in the contractual department or other employee in the authority form a side and the bidder or the bidders among themselves or others dealing with the authority from another side, which can lead to:*
- 1. Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings.*
 - 2. Dividing product markets or allocating them on grounds of geographic areas, distribution centers, type of customers, goods, seasons or time periods.*
 - 3. Coordination with regard to progress or failure to enter into other contracting processes, and guidance is given to coordination, inter alia:*
 - a. Presenting identical bids including agreement on common rules for calculating prices or setting of bid terms.*
 - b. Coordination on the person that will give the bid, including agreement in advance on the person that will be awarded, whether on a rotation, geographical basis, or on the administrative issuers or applicants.*
 - c. Coordination to present a cover bidding*
 - d. Coordination to prevent a person from competing in bidding.”*
28. In addition, Articles 37 and 38 of the Public Procurement Law state that in case of detection of a conspiracy or monopolistic practice before the award of the bid in question, the latter may be annulled and the fee of the request for proposal will not be reimbursed. Furthermore, if the bid has been already awarded, Article 50 of the same law states that the administrative body is obliged to terminate the contract and that the suppliers may be

¹⁴ Article 5 of the Executive Regulations of ECL states: *“Persons shall mean natural or juristic persons, economic entities, unions, federations, associations and financial grouping; regardless of the method of their establishment, mechanisms of their financing, their nationalities, headquarters or main centers of activities.*

Persons referred to in the first paragraph include the related parties that are composed of two or more persons, each of them has an independent legal capacity; and where the majority of stocks or shares of one of them is owned, directly or indirectly, by the other party or only possessed by a single party.

Related parties also include the person or persons who are subject to the actual control of another person, inter alia his spouse or relatives down to second degree; unless absence of that control is clearly established. Actual control means every arrangement, agreement or ownership of stocks or shares, regardless of its percentage, in a manner that leads to the control of the management or decisions taking.”

removed from the Register of Contracting Parties after consulting the competent Legal Advice Department of the State Council.

29. Including these articles represents one of ECA's valuable achievements. Earlier, ECA had observed a legal loophole in the repealed public bids law, by which the related parties can participate in the same bid as independent competitors. At the same time, ECA had no legal ability to apply Article 6 ECL, as the related parties are not competitors under ECL. Accordingly, ECA successfully cooperated with the competent authorities and ensured the amendment of the provisions of the above-mentioned law and its executive regulations to state explicitly that related parties are not to participate in the same bid as independent competitors.
30. In addition, the notification process stated by Article 33 for any anti-competitive practice will enable ECA to link its database with the other administrative bodies to facilitate the detection of bid rigging. For this purpose, ECA is seeking to acquire and explore the extent to which Artificial Intelligence can be a useful tool to shape the already available enforcement tools and enhance detections of bid-rigging collusions.

4.1.2. Amendments to the law relating to the procurement of pharmaceutical products and medical supplies

31. Concerning the medical sector, and due to ECA's role and effort in advocacy, a notification obligation to ECA has been added in the Executive Regulations No. 777/2008 of the Law Establishing the Egyptian Authority for Unified Procurement, Medical Supply and Technology Management. As such, Article 7 mentioned a specific provision obliging the Egyptian Authority for Unified Procurement to:

“notify the competition authority if it finds that there is an agreement, contract or exchange of information directly or indirectly or in coordination through third party - whether between any employee in the contractual department and bidders or between bidders – which can lead to:

Raising, lowering or fixing the prices of goods.

Market sharing or allocation based on geographical regions, distribution centers, customer quality, product quality, market shares or time periods.

Coordination in respect of progress or failure to enter into tenders, bids, practices and other operations”.

32. This article highlights the effort exerted by the legislator to catch anti-competitive bidders in all sectors, specifically, the medical sector, due to its importance to consumers.
33. To conclude, the addition of Article 33 of the Public Procurement Law and Article 7 of Executive Regulation No. 777/2020 will help ECA better detect the violations regarding bid rigging. Accordingly, this will improve the enforcement of ECA and will facilitate investigation in these cases, given the availability of evidence from the administrative bodies.

4.2. ECA's efforts in ensuring bid rigging detection

34. To ensure that all the efforts put forth by ECA will efficiently facilitate the detection of bid rigging, ECA prioritized such detection by recently creating a separate department to handle similar offences. This department cooperates with other relevant governmental bodies to better detect any offences and enforce the ECL. The department has already received several notifications from different public administrations in accordance with Article 33 of the Public Procurement Law, whether informing ECA of related persons

attempting to submit multiple offers for a single public bid, or notifying ECA of suspicions as to the existence of bid rigging.

35. In addition, it is necessary to train and educate the administrative bodies on the concept of bid rigging and on how to detect its occurrence. This is essential to guarantee the implementation of the obligatory notification system explained previously.
36. Therefore, ECA is currently finalizing its first Competition in Public Procurement Guidelines, which are largely inspired by the OECD guidelines.¹⁵ The Guidelines will discuss the harm that may occur to the market as a result of bid rigging as well as the different methods of infringement detection. These guidelines will be an essential tool for administrative bodies to comprehend the importance of notifying ECA with any violations regarding this matter.
37. In addition, ECA has established a new training program, which aims to educate and train those who work in public procurement in various administrative bodies on how to detect bid rigging and subsequently tackle them. This training program will not only be focused on the major governorates of the country, namely Cairo and Alexandria, as is usually the case, but will aim to reach administrative bodies all over the country. For instance, ECA has recently held a three-day workshop in February 2020 in the governorate of Luxor, which was attended by all employees working in public procurement in that governorate. This workshop has given the public officials a better understanding of ECL and its objectives, as well as the tools to detect and prevent bid rigging that harms public resources.

5. Conclusion

38. Bid rigging, being a form of hardcore cartel, has a negative impact on competition and the public interest, and so is criminalized under Article 6 ECL. ECA, as well as, the Egyptian Economic Court react severely to such practices. The criminal nature of bid rigging under ECL implies that the criminal public prosecution, which may create a general deterrence for not committing such crimes, can sue persons, not undertakings. On its end, ECA uses all available legal enforcement tools to detect bid rigging crimes including, but not limited to, holding hearing sessions, performing dawn raids, and obtaining relevant documents and information.
39. The ECA has placed great efforts with regards to various pieces of legislation, such as the Public Procurement Law, as well as the law regulating public procurement in the field of pharmaceuticals and medical supplies. Workshops and future guidelines will ensure better detection and criminal enforcement in the field of bid rigging.
40. Bid rigging is an illegal practice, ECA aims to spread awareness about this issue in all the concerned bodies in Egypt through cooperating with several state agencies, especially those involved in the process of public procurement. ECA aims to regulate anti-competitive conduct in the market through spreading competition law knowledge among bidders and market players, enabling ECA to better fight and detect bid rigging.

¹⁵ OECD, Guidelines For Fighting Bid Rigging In Public Procurement, 2009, Available at: <https://www.oecd.org/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>