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Efficiencies in Merger Control – Note by Egypt

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1. Introduction:

1. The Egyptian merger control regime (EMCR) was adopted by virtue of Law no. 175/2022, which granted the Egyptian Competition Authority (ECA) the power to conduct ex-ante review of economic concentrations. While the Law came into force on 30 December 2022, the EMCR entered into force on 1 June 2024, following Prime Ministerial Decree no. 1120/2024, which amended key provisions of the Executive Regulations (ER) of the Egyptian Competition Law (ECL) to reflect the new merger control system.

2. Despite being a relatively new framework, ECA has accumulated substantial experience in merger review and the assessment of efficiency claims. Since 2021, ECA has regularly reviewed transactions in the healthcare sector - pharmaceuticals, hospitals, radiology and medical testing - based on referrals from the Ministry of Health and Population and the Egyptian Drug Authority. Additionally, since 2015, ECA has assessed cross-border transactions referred by the COMESA Competition Commission.

3. Building on this experience, ECA has developed institutional know-how in assessing efficiency claims within the context of merger review. This paper outlines: (1) the legal framework for efficiency claims under the EMCR; (2) ECA's practical experience in assessing efficiency claims; and (3) the key challenges faced in this process.

2. Legal framework for efficiency claims under the EMCR

4. According to Article (19 bis b) of ECL and Article (60) of ER, ECA may grant clearance for an economic concentration, subject to the approval of the Cabinet of Ministers, in any of the following circumstances:

1. Where the non-implementation of the economic concentration would lead to the exit of one of the concerned persons and its assets from the market (i.e. a failing firm scenario).
 2. Where the implementation of the economic concentration would result in economic efficiencies that outweigh its anticompetitive effects.
 3. Where the economic concentration is related to the protection of national security.
5. In order for efficiency claims to be accepted by ECA, the second paragraph of Article (60) of ER stipulates that efficiencies must meet three cumulative conditions in order to be considered by ECA:
1. Economic efficiency must be verifiable;
 2. Economic efficiency is not achieved except through the implementation of the economic concentration (merger specific); and
 3. Economic efficiency should be passed to consumers.

6. The concerned persons may submit efficiency claims at various stages of the merger review process: at the time of notification, during the investigation phase, or after ECA submits a statement of objections identifying potential theories of harm. While the EMCR does not impose a strict deadline for the submission of efficiency claims, the concerned persons should be aware that any clearance on the basis of efficiencies requires

the approval of the Cabinet of Ministers. Therefore, ECA encourages the concerned persons to submit their efficiency claims early in the merger review process.

3. ECA's practical experience in assessing efficiency claims

7. This section highlights how ECA has assessed efficiency claims in practice, focusing on three main cases: 1) the merger between two ride-hailing service providers (2019); 2) the merger between two major hospital groups in Egypt (2021); and 3) the merger between a leading medical testing provider and a major hospital group (2023).

3.1. Case 1: Merger between two ride-hailing service providers (2019)

8. On 7 April 2019, ECA received a request to review the acquisition by a ride-hailing service provider of 100% of the shares of its closed competitor.

9. In Egypt, the parties were both active in app-based ride-hailing via passenger vehicles, high-capacity vehicles (microbuses, mini-busses, and busses), scooters, and tuk-tuks. Accordingly, the transaction gave rise to a horizontal overlap between the parties' activities.

10. Following an in-depth assessment, ECA concluded that the transaction would result in a significant impediment to effective competition in the Egyptian market. The parties were each other's closest competitors, and the transaction would eliminate the competitive constraints exercised by the target on the acquirer and consequently strengthening the acquirer's market power in the Egyptian market. ECA found this would limit consumer choice, raise prices, degrade service quality, and slow innovation. It could also allow the post-transaction entity to leverage its market power into adjacent markets.

11. In response to these findings, the parties submitted efficiency claims in support of the transaction. The submitted efficiency claims and ECA's findings were as follows:

- Development of new solutions: The parties argued the merged entity would be more effective in pursuing new solutions than either party independently. ECA found this claim was not merger-specific; as such innovations could be achieved by other less restrictive means.
- Introduction of new customer services: The parties claimed the merger would facilitate the rollout of new services. ECA rejected this argument, finding no evidence to demonstrate the services were contingent on the merger. No data was submitted to quantify how the transaction would contribute to this outcome.
- Expansion of low-cost transport and high-capacity vehicles: It was argued that the merger would help bring affordable transportation to underserved populations and improve high-capacity transport options. ECA found these goals could be achieved independently of the merger. The parties failed to demonstrate that the efficiencies were both verifiable and merger-specific.
- Creation of new services: The parties suggested the merger would lead to the development of entirely new services. ECA found this claim unsupported. The parties presented no concrete plans or evidence, and the referenced services were already being offered in other countries. As such, the claim lacked both verifiability and merger-specificity.

12. ECA ultimately rejected all efficiency claims on the grounds that, the efficiencies were either not verifiable, not merger-specific, or did not demonstrate clear benefits to consumers.

3.2. Case 2: Merger Between Two Hospital Groups in Egypt (2021)

13. In 2021, ECA assessed the acquisition by one of Egypt's private hospital groups of 100% of the shares of another hospital group. Both parties were dominant providers of private multi-specialty healthcare services, and the transaction resulted in a significant horizontal overlap.

14. ECA's assessment concluded that the transaction would substantially lessen competition in the market by eliminating the strong competitive constraints each group exerted on the other. The transaction was expected to increase market power, reduce price competition, and lead to adverse effects across multiple dimensions – affecting not only patients but also suppliers, medical staff, and other health care providers. Specifically, ECA found that the merger could:

- Lead to higher prices for patients;
- Reduce service quality and innovation incentives;
- Exert downward pressure on doctors' salaries; and
- Negatively affect the prices of medical equipment and supplies.

15. In response, the parties submitted efficiency claims in an attempt to demonstrate that the transaction would generate procompetitive benefits.

1. Increased Hospital Bed Utilization Leading to Cost Reductions: The parties claimed that the post-merger entity would reduce medical service costs by improving hospital bed utilization. ECA found that this efficiency was not merger-specific, as both parties could independently enhance utilization rates through more effective scheduling and insurance negotiations without the need for the transaction.
2. Economies of Scale through Bulk Purchasing Discounts: It was argued that the merged entity would obtain larger discounts from suppliers for medical equipment and pharmaceuticals due to higher purchase volumes. ECA rejected this claim on several grounds: the parties did not demonstrate that such discounts were contingent on the merger; the realization of discounts lacked certainty amid inflationary pressures; and there was no commitment or mechanism to pass on the cost savings to consumers.
3. Introduction of New Specialized Medical Services and Infrastructure Optimization: The merging parties stated they would launch specialized services, renovate hospitals, and optimize hospital locations across Egypt. ECA concluded that such developments were not merger-specific. The market itself had full potential for growth in specialized services, and infrastructure improvements could be undertaken independently through investment.
4. Improvements in Infrastructure, Quality, Technology, and Training: According to the parties, the transaction would result in better service delivery, modernized infrastructure and IT systems, expanded job opportunities, and staff training. ECA found that those improvements were not merger-specific; as all of the above-mentioned efficiencies could be achieved independently by either party through planned capital investment and operational improvements.

5. Integration of Managerial and Operational Functions to Lower Costs: The merging entities claimed that synergies from unifying operations, including managerial functions and storage systems, would reduce costs. ECA noted that no evidence was provided that such cost savings would be passed on to consumers through lower prices or improved services. As a result, this claim failed to demonstrate consumer benefit.
16. ECA rejected all efficiency claims on the basis that they failed to meet the criteria of merger-specificity, verifiability, and pass-through to consumers.

3.3. Case 3: Acquisition of a Medical Testing Provider by a Hospital Group in Egypt (2023)

17. On 27 December 2022, ECA received a request from the General Authority for Investment (GAFI) to provide its opinion regarding a proposed acquisition whereby one hospital group would acquire a majority stake in a provider of medical testing services.

18. Although the two entities operated in different segments of the healthcare sector - hospital services and diagnostic services (including medical testing and radiology) - the transaction raised conglomerate concerns, as overlap arose between the parties' activities in medical testing services, diagnostic radiology services, and medical services provided by hospitals.

19. ECA's investigation identified a number of potential anti-competitive effects arising from the transaction. These concerns stemmed from the investment portfolio of the hospital group post-transaction which would become massive, encompassing a wide range of medical services, medical laboratories, diagnostic radiology centers, and hospitals, distributed across key areas in Cairo and Giza. This expanded market presence could lead to price increases across services, potentially setting a new benchmark in the market and triggering price hikes among competitors. Such price increases would likely be passed on to patients and insurance companies. Moreover, the transaction could limit the ability of independent medical laboratories to compete or expand, and may discourage green-field investments in the hospital services due to increased market entry barriers.

20. As a result, the parties claimed economic efficiencies as follows:

- Enhancing the National Healthcare Insurance System: The parties argued that the transaction would contribute to the effectiveness of Egypt's national healthcare insurance system by offering high-quality, affordable services across various governorates. ECA rejected this claim as unverifiable. It noted that, contrary to the parties' assertion, the increased market power and concentration would likely result in higher average service costs, thereby increasing the cost base used to calculate reimbursement rates under Law No. 2/2018 (governing the social solidarity-based national insurance system). This would increase the financial burden on the public budget and reduce the system's efficiency and sustainability.
- Creation of an Integrated Digital Medical Records System: The merging parties also claimed the transaction would enable the creation of a shared database of patient records—including medical testing, radiology, and hospital data—providing doctors with more comprehensive patient information. ECA concluded that this claimed efficiency was not verifiable and, moreover, there was no evidence it would result in a measurable benefit to consumers. The parties did not demonstrate how the integration would be implemented, nor how it would improve patient outcomes or reduce costs.

21. ECA ultimately rejected the efficiency claims submitted by the parties, as they did not meet the criteria of verifiability, merger-specificity, and consumer pass-through. The case illustrates ECA's careful consideration of conglomerate effects in sensitive sectors such as healthcare.

4. Key Challenges Faced by ECA in Assessing Efficiency Claims

22. National competition authorities in emerging economies often face distinct challenges in the assessment of economic efficiencies. For ECA, these challenges are particularly evident in the context of merger review, mainly from the lack of reliable data. In many developing countries, the lack of detailed and transparent information on market shares, pricing structures, input costs, and consumer behavior impedes robust economic modeling and undermines the ability to verify the validity, magnitude, and merger-specificity of claimed efficiencies. This irregularity in information places authorities at a disadvantage when attempting to analyze claims put forward by merging parties.

23. Another complexity arises from the widespread presence of informal markets. In Egypt, as in many developing economies, a significant portion of economic activity takes place outside formal regulatory frameworks. These informal markets, which operate largely outside the purview of state regulation and taxation, are characterized by unregistered businesses, self-employment, and transactions based on trust and social networks. Their prevalence can obscure the actual competitive landscape, making it challenging to assess the true market dynamics and the likely impact of a transaction on competition and consumer welfare.

5. Conclusion

24. In conclusion, despite facing significant challenges – including market complexities, lack of reliable data and limitations in econometric tools – ECA has developed a robust approach to assessing economic efficiencies in merger control. Guided by ECL and its ER, ECA applies clear criteria focused on verifiability, merger-specificity, and consumer benefit.

25. Through practical cases such as the transaction in ride-hailing market and major transactions in the healthcare sector, ECA has demonstrated rigorous analysis, carefully weighing efficiency claims against potential anti-competitive effects. While certain claims were accepted where substantiated and beneficial to consumers, others were found non-merger-specific, unverifiable or offer no clear consumer benefit.

26. ECA's framework for evaluating efficiencies has evolved significantly, particularly with the implementation of Egypt's new merger control regime aligned with international best practices. This alignment reflects ECA's commitment to international best practices and ensures a more structured, transparent, and economically sound merger review process going forward.