جهاز حماية المنافسة
EGYPTIAN COMPETITION AUTHORITY

GUIDELINES ON COMPLIANCE WITH THE EGYPTIAN COMPETITION LAW: ECA'S COMPLIANCE TOOLKIT



2022

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INTRODUCTION

Competition policy is an important tool, which contributes to achieving economic development.

Competition among undertakings in markets drives economic efficiency as well as consumer welfare, as it leads to the increased availability of products with competitive prices and better quality. Competition also contributes to incentivizing innovation and cost reductions, which in turn shall benefit the national economy, and will achieve optimal economic efficiency.

In this context, Law No. 3 of 2005 on Competition Protection and Prevention of Monopolistic Practices ("Egyptian Competition Law" or "ECL") was promulgated to ensure the freedom of competition and achieve economic efficiency as well as competitive neutrality. ECL also states the establishment of the Egyptian Competition Authority (the "Egyptian Competition Authority" or "ECA"). ECA is an independent body established in 2006, to monitor markets and detect violations to ECL. ECA's role is to ensure free competition in markets and prevent anticompetitive practices in a manner that ensures producer and consumer welfare, while strengthening the efficiency of the national economy.

ECA emphasizes on creating and developing awareness of the principles of free competition, as well as creating a clear understanding of the provisions and rules stipulated by ECL. The dissemination and promotion of awareness of ECL's provisions and the competition culture are optimal ways to promote and advocate competition policies. For this reason, ECA has published this Compliance Toolkit, with the aim of spreading competition culture and raising awareness on the benefits of complying with ECL. This Toolkit aims at enhancing compliance of all undertakings engaged in any economic activity according to the provisions of ECL, by guiding them to avoid anticompetitive practices and to design their own legal compliance programs.



Who are the persons subject to ECL provisions?

Article 2(a) ECL identifies the persons subject to ECL as: "Natural and juristic persons, economic entities, unions, financial associations and consortiums, groups of persons notwithstanding their means of incorporation, and related parties." In general, all natural and juristic persons that are engaged in economic activities are subject to ECL, this includes:

- All types of companies, such as shareholders companies, joint liability companies, limited partnership companies, joint stock companies with shares and limited liability companies, as well as holding and affiliated companies.
- Trade associations in which the aforementioned companies participate.
- All companies notwithstanding their methods of incorporation, financing, nationalities, headquarters location, or the main location of their businesses.
- All unions and syndicates.
- Natural persons engaging in any economic activity, such as various liberal professions.

Article 5 of ECL states: "The provisions of this Law shall apply to acts committed abroad should these acts result in the prevention, restriction or harm of the freedom of competition in Egypt and which constitute crimes under this Law". ECL is applicable to practices committed by persons outside Egypt if such practices restrict competition within the Egyptian market.

What are the benefits of complying with ECL?

DISSEMINATING COMPETITION CULTURE

Disseminating competition culture will encourage a greater number of concerned parties, such as government agencies, the business community and other stakeholders, to avoid issuing decisions that do not follow competition policies or avoid engaging in any anticompetitive practices.

RESPECTABLE REPUTATION

Compliance with ECL provisions effectively leads to improving the persons respectable reputation while increasing the competitiveness index and compliance with ECL.

DETECT ANTI-COMPETITIVE PRACTICES

Disseminating awareness of ECL assists ECA in detecting various anticompetitive practices. This leads to safeguarding different markets and supporting a free market policy based on supply and demand.

AVOID COURT DECISIONS AND FINANCIAL PENALTIES

Persons that are aware of ECL's provisions would not engage in prohibited anti-competitve practices. Hence, avoiding court decisions imposing financial penalties for infringing ECL.

PROMOTING INVESTMENT

Reducing barriers to entry and ensuring competitive neutrality, supports and encourages foreign and local investors to enter and expand in the maket.

I: What are the anticompetitive practices according to ECL?

Practices prohibited by ECL are considered offences punishable by criminal penalties. ECA Chairperson, upon approval of the majority of the Board members, may request the initiation of criminal proceedings, pursuant to the provisions of Article 21 of ECL, which states: "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 is submitted upon the consent of the majority of the of its Board members.". Economic courts have the jurisdiction for imposing penalties in relation to ECL offences.

Article 25 of ECL states that such a penalty is personal, as the person responsible for the actual management of the juristic person shall be subject to the penalties stipulated for the acts committed in violation of the provisions of ECL. The juristic person shall be jointly liable for paying the financial penalties and compensation ruled by the court, if the breach has been committed by one of its employees acting in the name of or on behalf of the juristic person.

It is worth noting that ECA can settle concerning any infringements in accordance to the provisions of Article 21 ECL. This shall be, after the approval of the majority of the Board members and before a final ruling is issued by the relevant court. The settlement shall also be considered a waiver of the request to initiate a criminal case, and results in the lapse of the criminal case.

Anticompetitive practices as per ECL are as follows:

6 Article

Horizontal Agreements

7 Article

Vertical agreements

8 Article

Abuse of Dominant Position

19 Article

Failure to notify Economic Concentrations to ECA

1

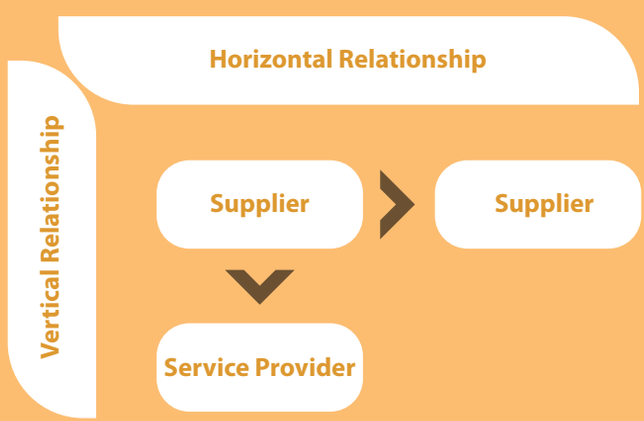
Horizontal Agreements: Article 6 para.1 of ECL

Horizontal agreements - also known as cartels - are agreements between (current or potential) competitors in the same relevant market, including, but not limited to, agreements on fixing prices; allocating geographic areas, customers, quantities; limiting product availability; or bid-rigging.

Horizontal agreements are among the most harmful competition offences. Competitors should make their decisions individually without any form of coordination or agreement between one another. This is in line with the principles of a free market economy, which assume that markets function based on supply and demand mechanisms without the influence of any other entities.

Accordingly, these practices are considered per se, or by object violations; which by their nature cause restriction of competition. This means that it is not necessary to prove the execution of the agreement or its anti-competitive effect. Such agreements lead to increased prices and loss of incentive for companies to reduce costs or innovate, reducing social and consumer welfare and leading to distribution inefficiency.

Horizontal and Vertical Relationships



Article 6: Horizontal Agreements

Article 6 para.1 ECL explicitly prohibits competitors from entering into anti-competitive horizontal agreements. It also outlines the types of agreements which are prohibited for competitors.
Article 6 states: "Agreements or contracts between competing persons, in any relevant market, are prohibited, if they cause any of the following:

a) Increase, decrease or fix prices of relevant products

b) Divide product markets or allocate based on geographical areas, distribution centers, type of customers, type of goods, market shares, seasons or periods of time.

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 products. This includes restricting product type or volume or limiting the availability thereof."

Competing Persons

Competing persons, or competitors, are undertakings currently or potentially operating in the same relevant market.

What is the meaning of "if they cause" in Article 6 ECL?

Agreements violating Article 6 do not necessarily have to be explicit and clear agreements on increasing, decreasing or fixing prices, restricting distribution or production, dividing markets, or bid-rigging. It is sufficient that the agreement is likely to cause any of the mentioned effects based on the content of the agreement and its circumstances.

Forms of Agreements

Horizontal agreements have been defined by the Egyptian courts as "the concurrence of wills of two or more persons who are considered by law to be competing persons on any act related to their economic activity, with the intention of restricting or limiting competition in the market in which they operate, whether the agreement is written or verbal, or whether it is based on an active or passive act."

Agreements in the context of ECL do not necessarily have to be contracts that create legal effects and obligations. Horizontal agreements can take many forms such as gentlemen's agreement or contracts.



Article (6): Horizontal Agreements

"Horizontal agreements stated by Article 6 ECL are prohibited per se and do not necessitate the realization of a particular harm; the violations occurs even if the agreement restricting competition has not been implemented."

Examples of practices resulting from horizontal agreements

Price agreements:

Agreements or contracts between competitors to increase, decrease, or fix prices for any reason, whether for a specified or indefinite period.

Market allocation agreements:

Agreements or contracts between competitors not to compete in specific markets or geographic areas, or for the same category of customers.

Bid rigging:

Agreements or contracts between competitors to coordinate the prices or quantities of goods or services before submitting bids to determine the winner, through bid rotation, market allocation, or price coordination.

Output restriction agreements:

Agreements or contracts among competitors to restrict the production of a good or the provision of a service.

In the case of meetings between competitors (such as those held in trade associations), competitors should not share confidential information in order to avoid infringing any provisions of Article 6 ECL.

Persons who are not operating in the same relevant market (such as consulting firms) may facilitate the exchange of information and coordination between competitors, ("Cartel Facilitators"). These persons can be considered as accomplices pursuant to article 40 of the Criminal Code

All market players should **avoid sharing sensitive and strategic information, such as future plans for prices or quantities.** The exchange of sensitive information is a type of agreement between competitors that may significantly restrict competition and, consequently, may constitute a violation to Article 6 ECL.

Therefore, competitors should be careful when exchanging information to avoid infringing Article (6) ECL.

What is the penalty forviolating Article 6?

Article (22) of ECL stipulates that violations of Article 6 shall be punished by: "a fine of not less than two percent of the gross revenues of the product subject matter of the violation, and not exceeding twelve percent of the aforementioned gross revenues, within the violation period. In case of the inability of calculating the aforementioned revenues, the penalty shall be a fine of not less than five hundred thousand Egyptian Pounds, **and not exceeding five hundred million Egyptian Pounds.**

The minimum and maximum limits of the fine shall be doubled, in case of recidivism for violating the provisions of any of the Articles 6, 7, 8 of this Law, and in case of failure to comply with the decisions adopted by the Authority in accordance with Article 20 of this Law".

Example of an agreement in violation of Articles 6(a) and 6(d) ECL

ECA received a request from the Minister of Trade and Industry to study whether there are any agreements or anticompetitive practices in the cement sector in Egypt.

During the study period (which starts at the date of the entry into force of ECL on 16 May 2005), the study conducted by ECA concluded that the cement production companies agreed to increase prices in violation of Article 6(a) ECL. ECA also detected a violation of Article 6(d) ECL, as these companies agreed to restrict marketing in the relevant market by allocating market shares in the Egyptian market.

In addition, the Nasr City First Misdemeanors Court ruled that all the companies were punished with a fine of EGP 200 million.

Example of an agreement in violation of Article 6(c) ECL

ECA initiated a study on the public procurement market for medical supplies of cardiothoracic surgery. ECA received information regarding the suspected coordination between several bidders in this market in violation of Article 6 ECL.

ECA conducted dawn raids on the premises of relevant companies under investigation, and gathered data and documents from the relevant authorities and other sources. Based on the legal and economic analysis of all the information and data gathered throughout the investigation, ECA detected that the companies had coordinated to submit identical price offers. Aiming to take advantage of Article 68 of the Executive Regulations of Public procurement Law No. 89 of 1998, which allows for awarding the bidders who have submitted identical offers the entire volume of products to be equally shared amongst them.

Therefore, ECA's Board of Directors concluded that there had been a violation of Article 6(c) ECL and referred the matter to the public prosecution. The Economic Court issued a ruling whereby it imposed a fine of EGP 500 million to be paid by the companies.

An example of an agreement in violation of Article 6(d)

ECA received a complaint against two Pharmaceutical companies, alleging that the companies had agreed to bundle two separate products. The agreement was that two medications which they both produce for the treatment of Hepatitis C Virus, namely Daclatasvir and Sofosbuvir, should only be sold together as a bundle. This agreement would force Egyptian patients to buy specific medications and would restrict the competitiveness of companies producing only Sofosbuvir.

ECA's Board of Directors decided that the two companies had violated Article 6(d) ECL for their agreement to restrict the distribution of Sofosbuvir and Daclatasvir by agreeing to bundle them together. The Board also ordered both companies to individually set the prices of their products and take the marketing decisions without coordination or exchanging of confidential and sensitive information with any of their competitors.

The two companies submitted a request to settle with ECA before initiating the criminal proceedings. ECA accepted the settlement request and the payment of the prescribed settlement amount pursuant to the provisions of Article 21(a) ECL.

An example of an agreement in violation of Articles 6(b) and 6(d)

ECA initiated an investigation following the sudden exit of an online delivery company from the Egyptian market. Raising the possibility of the occurrence of an anticompetitive practice in violation of ECL.

Based on the investigation, ECA established that the company's exit from the Egyptian market resulted from a market allocation horizontal agreement made in one of the European countries between the two parent companies of the two largest online delivery companies in the Egyptian market in violation of Article 6 ECL. Market allocation on a geographical basis between competitors is one of the most harmful anticompetitive practices, as it falls out of natural competition that gives consumers the freedom of choice between products and ensures competitive prices and better quality.

Accordingly, ECA Board of Directors issued its decision that the two parent companies had infringed Articles 6(b) and 6(d) ECL. ECA ordered the companies to immediately cease the implementation of the anticompetitive agreement, to restore the situation to what it was before the conclusion of these agreements, and for the company that had exited the Egyptian market to re-operate. The two companies have complied with ECA's decision.

How to comply with the provisions of Article 6 ECL?

In order to avoid the penalties of horizontal agreements, competitors must make decisions individually. This is in alignment with principles of free market economy that assumes that competition among undertakings should be based only on supply and demand mechanisms, without any influence from third parties.

1. Regarding the independence of decision-making, undertakings should:

- Make decisions independently with regard to pricing, production and sales strategies, and anything related to customers or suppliers.
- Avoid coordination with competitors on allocating markets, customers, or products.
- Avoid coordination with competitors on restricting manufacturing, production, distribution, or marketing of products, or restricting the type or size of products or limiting their availability

2. In case of any dealings with competitors, undertakings should:

- Maintain the confidentiality of sensitive commercial information and ensure that such information is not shared with competitors.
- Ensure that any discussions with competitors do not lead to any arrangements that restrict competition or lead to the exchange of confidential information, as informal discussions or agreements with competitors may constitute a violation of Article 6 ECL.
- Keep clear meeting minutes in the event of discussions with competitors.
- Be aware of "cartel facilitation".

3. When attending meetings with competitors in trade associations, undertakings should:

- Ensure that there is a clear meeting agenda set out before any meeting, and distributed to participants before the meeting in a timely manner.
- Ensure that the meeting follows the set agenda.
- Be careful when engaging in discussions with other members during or after meetings. Any discussion and exchange of sensitive information such as prices, market shares, or customers should be avoided.
- Keep clear meeting minutes in order to verify whether a practice might constitute a violation of Article 6 ECL.
- Report to ECA any members who undertake any act that would cause anticompetitive effects, whether directly or indirectly.
- Immediately object upon the occurrence of any discussion on the exchange of information about prices, customers or any confidential information.
- Make sure to record objections in the meeting minutes.
- Exit the meeting if such discussions continue, and reiterate the objection.
- Make sure not to undertake/implement any of the discussed anticompetitive practices.

4.Regarding public procurement (such as tenders, auctions, and other forms of procurement), undertakings should:

- Avoid coordinating or participating in discussions with competitors regarding proceeding or refraining from entering tenders, auctions, and other forms of procurement.
- Maintain full confidentiality of all details of the technical and financial offers submitted.
- Avoid meeting with other bidders before submitting bids to avoid suspicions.
- Avoid agreements on who will be awarded the bid.

How to avoid penalties for violating Article 6 ECL?

After Agreement

Request for exemption in accordance with Article 6 para. 2 ECL

The Objective

Achieving economic efficiencies and consumer benefits that outweigh the anticompetitive effects

Request for leniency in accordance with Article 26 ECL

The Objective

Avoiding the initiation of criminal proceedings as well as the imposition of penalties or the issuance of court .decisions

Before Agreement

Request for an exemption in accordance with Article 6 para. 2 ECL

In some instances, horizontal agreements may be exempt if they achieve economic efficiencies and consumer benefits that outweigh their anticompetitive effects. "Economic Efficiencies" shall mean: "reducing the average variable cost of the products, improving their quality, increasing the volume of their production or distribution, producing or distributing new products, or fast-tracking their production or distribution".
For example, such agreements may consist of: distribution agreements, production agreements, or research and development agreements.

Article 6 para. 2 ECL states:

"ECA, upon the request of the concerned parties, may exempt the agreement or the contract aimed at achieving economic efficiency, if it is established that the aforementioned agreement or contract would achieve consumer benefits that outweigh the anticompetitive effects. The Executive Regulations shall determine the procedures and conditions of submitting the request, as well as the framework of issuing the decision by the Authority".

What are the conditions for submitting a request for exemption in accordance with Article 6 para. 2 ECL?

Proving that the agreement or contract aims to achieve economic efficiency + **Proving that the agreement or contract achieves consumer benefits that outweigh the anticompetitive effects** = **Exemption**

The undertakings must prove the causal-link between the agreement and the economic efficiency to be achieved, as it is necessary to prove that the agreement will result in economic **efficiencies that could not be achieved otherwise.** Such economic efficiency may include developing new production techniques, or improving the production, distribution, and quality of goods.

The consumer benefits arising from the agreement must outweigh its actual or potential anticompetitive effects. For example, research and development agreements may lead to a price increase, but the consumer is compensated for this increase in the form of new and improved products.

In case of granting the exemption, ECA may monitor the compliance of the parties with the terms and conditions of the exemption.
ECA's approval shall be valid for a maximum of two years, and may be renewed upon a request submitted by the relevant party to ECA sixty days before the end of the period.

Article Six: Horizontal Agreements

Leniency Policy

Article 26 ECL provides immunity from the prescribed penalties for the violators if they provide ECA with the necessary evidence to detect and establish the anticompetitive horizontal agreements prohibited by Article 6 ECL. This Article provides for both total and partial immunity as follows:

Partial Immunity

The court may grant immunity of half the penalty for the remaining violators, if they contribute to detect and establish the elements of the violation.

Total Immunity

Criminal proceedings will not be initiated against the first violator who took the initiative to inform ECA of their violation of Article 6 ECL, while providing ECA with the necessary documents and information to detect and establish the violation.

Request for an exemption from the penalty in accordance with Article (26) ECL:

Article (26): "In case of committing any of the crimes stated by Article (6) of this Law, the criminal lawsuit shall not be initiated against the first violator who takes the initiative to inform ECA of the offence and submits the supporting evidence that shall contribute to detect and establish the elements of the crime.

The Court, with regards to the remaining violators, may grant immunity to the violator, half of the prescribed sanction, if they contribute to detect and establish the elements of the crime at any stage of inspection, the investigation and trial processes"

Example of the leniency benefits

ECA received a complaint against one of the Pharmaceutical Distributors and Importers associations, alleging that the reported association had agreed to unify sales and marketing policies by reducing credit periods and cash discounts for small and medium size pharmacies.
Subsequently, ECA established that five pharmaceutical distribution companies had violated the provisions of Articles 6(a) and 6(d) ECL.
One of the market players – and a cartel member - submitted a leniency request and provided ECA with the necessary evidence to establish the violation. Accordingly, all the undertaking members of the cartel were referred to the court, except for the beneficiary of the leniency.

Benefits of Leniency:

. Criminal proceedings were not initiated against the leniency applicant and, consequently, no penalties were imposed on him and he was not subject to a court decision.
. The penalty for the violation was avoided by the applicant, which reached EGP 500 million per each violator.

For more information, see ECA Guidelines on Leniency policy according to Article 26 ECL, available on the official website of ECA:
http://www.eca.org.eg/ECA/upload/Publication/Attachment_A/129/Leniency%20Guildlines%20ECA.pdf

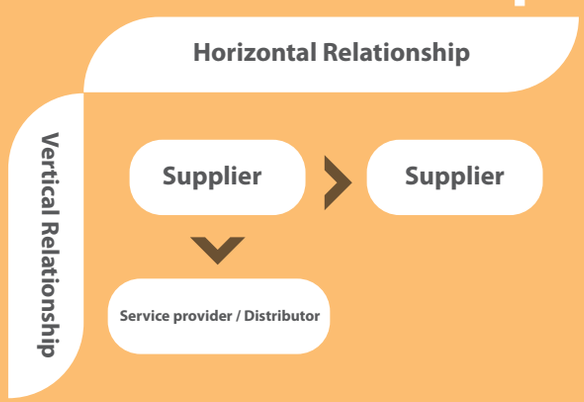




2
Vertical Agreements - Article 7 ECL

The provisions of Article 7 ECL aim to protect competition at all stages of production and distribution of the different products. As such, agreements and contracts between persons in a vertical relationship that restrict competition are prohibited.

Horizontal and Vertical Relationships



> Article 7 ECL stipulates that: "Agreements or contracts between a Person and any of their suppliers or clients are prohibited if they would restrict competition".

Not all vertical agreements violate the provisions of Article 7 ECL. Such violations are considered "by effect" violations, as some vertical agreements may lead to achieving economic efficiencies in the market and do not restrict nor harm competition, while others may restrict and harm competition. Therefore, ECA examines these agreements and contracts according to the criteria stated by Article 12of the Executive Regulations, namely:

1 The effect of the agreement or contract on the freedom of competition in the market.

2 The consumer benefits resulting from the agreement or contract.

3 Considerations related to quality, reputation, safety and security, in a way that does not harm competition.

Practices that may be prohibited according to Article 7:

1
Resale Price Maintenance

2
Exclusive Distribution

3
Most Favored Nation Clauses

4
Single Branding

5
Passive Sales Restrictions

Resale price maintenance

Resale price maintenance (RPM) occurs when a supplier imposes on its distributors an obligation to resell its own products with fixed, recommended, minimum or maximum prices. RPM is one of the vertical agreements that may harm competition, because it restricts intra-brand competition. It may also result in the coordination of prices among distributors (who are considered competitors) especially when setting minimum or fixed prices.

Most Favored Nation Clauses

The most favored nation clauses (MFN clauses) are anticompetitive vertical agreements where one party cannot provide products at prices better than those offered by the other party. For example, a distributor may require a supplier not to sell products at a better price to other distributors, which will lead to the distributors' inability to provide the product at better prices; hence reducing competition and raising prices for consumers.

Exclusive distribution agreements

Exclusive distribution agreements occur when a supplier agrees with a distributor to sell the suppliers products exclusively, or agrees with the distributor to work exclusively with the supplier in certain geographic areas, distribution centers, customers; seasons or periods.

Single Branding

Single branding occurs when a supplier agrees with a distributer to buy and distribute their product exclusively.

Restricting active sales

Active sales occur when a distributor in a designated geographical area seeks to attract consumers located in another geographical area in an explicit and direct manner. For example, this is accomplished through advertisements or solicited discounts. Generally, the restriction of active sales is not a violation of Article 7 ECL.

Restricting passive sales

Passive sales, or unsolicited sales, mean that a distributor in a designated geographical area fulfills orders from consumers in other geographical areas without seeking to attract them in an explicit and direct manner. Online sales are a form of passive sales. Generally, the restriction of passive sales is a violation of Article 7 ECL, as it limits the consumer's freedom of choice between the best products at the best prices.

What is the penalty for violating Article 7 ECL?

Article 22 of ECL stipulates that violations of Articles 7 shall be punished by: "a fine of not less than one percent of the gross revenues of the product subject matter of the violation, and not exceeding ten percent of the aforementioned revenues, within the violation period. In case of the inability of calculating the aforementioned revenues, the penalty shall be a fine of not less than one hundred thousand Egyptian Pounds, and not exceeding three hundred million Egyptian Pounds.

The minimum and maximum limits of the fine shall be doubled, in case of recidivism for violating the provisions of any of the Articles 6, 7, 8 of this Law, and in case of failure to comply with the decisions adopted by the Authority in accordance with Article 20 of this Law."

Example of anticompetitive vertical agreements

ECA received a complaint alleging that a photography studio is the sole and exclusive studio that can provide photography and video recording services for wedding events in luxury hotels in Alexandria governorate.

ECA established that the relevant product market is the photography services of wedding events in five-star hotels or in similar establishments, and that the geographic area is Alexandria governorate.

Based on the legal and economic analysis from the information and data obtained by ECA, it was found that the studio's agreements with the hotels violates article 7 ECL. ECA concluded that such agreements would restrict the freedom of competition and restrict consumer choice in terms of the availability of services and their prices. In particular, during meetings conducted with market players, it was found that such agreements negatively affected market players in the relevant market and led to the exit of some studios from the market, as they were being unable to provide their services in the aforementioned hotels because of the contractual conditions upon requiring changing the photographer.

How to comply with the provisions of Article 7 ECL

1. With regards to Vertical Agreements, undertakings should:

- Review the types of agreements concluded to ensure that they do not violate Article 7. These agreements include:
  - Resale price maintenance.
  - Exclusive distribution agreements.
  - Most favored nation clauses.
  - Single Branding agreements.
  - Passive Sale Restrictions.
- In the event of concluding any of the aforementioned agreements, ensure that the agreement does not restrict competition, and take into account if these agreements achieve benefits to the consumer welfare or if the agreements are necessary to maintain product quality, reputation, safety or security requirements.
- In case of noticing the possibility of the existence of anticompetitive vertical agreements in the market, inform ECA and provide evidence (if any) to help detect such violations.

3

Abuse of Dominant Position - Article 8 ECL

Article 8 ECL provides an exhaustive list of prohibited practices if committed by a dominant person. These practices are anticompetitive, since they create barriers to expansion for actual competitors and barriers to entry for potential competitors.

It is worth noting that holding a dominant position in itself is not a violation of ECL. Nevertheless, if the person holding a dominant position commits any of the prohibited practices; these practices would be considered a violation of ECL.

Exploitative practices

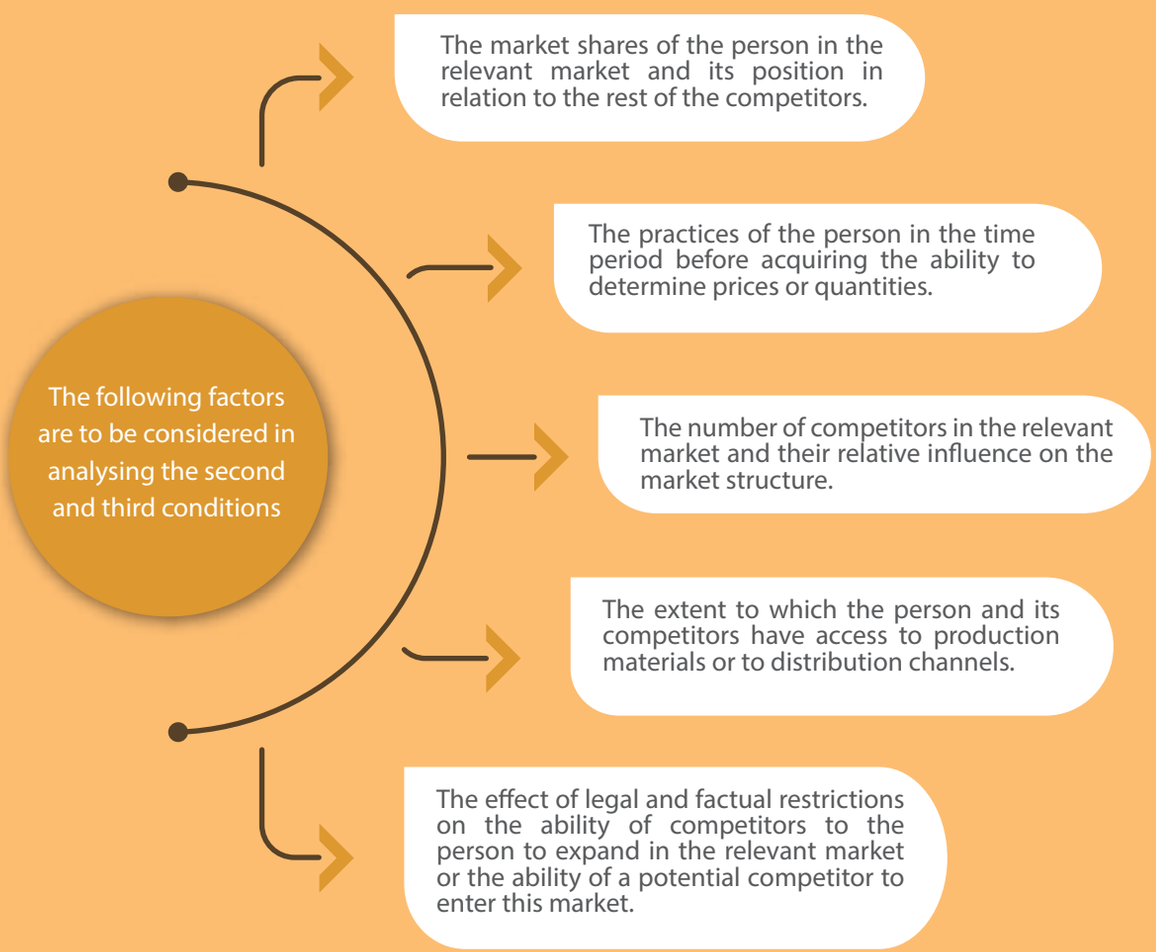
The person uses its dominant position to exploit consumers

Exclusionary practices

The dominant person develops strategies and practices that lead to the exclusion of its competitors from the market, and thus restricting competition

Dominance in a relevant market is achieved if the following cumulative conditions are met:

1) The person's market share exceeds 25% of the relevant market. The calculation of these shares is based on the two elements of the market, namely the relevant product and the geographic area, during a certain period of time.
2) The ability of the person to significantly impact the prices or quantities of the products in the relevant market.
3) Competing persons do not have the ability to limit the person's ability to significantly impact the prices or the quantities of the products in the relevant market.



A dominant undertaking will have committed a violation if they carry out any of the acts stipulated by Article 8 ECL and Article 13 of the Executive Regulations:

(a) Undertaking an act that limits, fully or partially, the manufacturing, production or distribution of a product, for a certain period or periods of time that are sufficient to prevent, restrict, or harm the freedom of competition.

(b) Refraining from entering into agreements or contracts with any person or completely ceasing to deal with them in a manner resulting in the restriction of their freedom to compete in the market. This may include imposing excessive or unnecessary financial or contractual obligations. Refraining from dealing with a person or ceasing to deal with them is not prohibited if there are justifications related to the persons inability to fulfill its contractual obligations.

(c) Any act that limits distribution of a specific product, based on geographic areas, distribution centers, clients, seasons or periods of time between persons in a vertical relationship. Vertical relationship is a relationship between the dominant person and any of its suppliers or its distributors.

(d) Making the conclusion of a contract or an agreement of a product subject to acceptance of obligations or products, which, by their nature or according to commercial usage, have no connection with the product subject of the original contract, or agreement.

(e) Discrimination in any type of contract or agreement between the dominant person and its suppliers or its distributors that are in similar commercial positions; whether such discrimination is made in terms of prices, quality or other terms of dealing, in a manner that limits their ability to compete with one another or leads to the exit of market players.

(f) Refraining, fully or partially, from producing or providing a scarce product, when its production or provision is economically possible. Scarce products are products with limited supply compared to their demand.

(g) Imposing conditions on persons dealing with the dominant persons not to provide its competitors with their required facilities and services, despite it being economically feasible. These utilities and services include those owned privately by the persons dealing with the dominant person, and are essential for its competitors to enter or remain in the market.

(h) Selling products below their marginal cost or average variable cost. Marginal cost is the cost of one unit of a given product from the total costs within a certain period. The variable cost is the cost which changes with the change in the volume of products provided during a certain period of time. Average variable cost is defined as the total variable costs divided by the number of units of certain products. For the determination of whether the product is sold below their marginal cost or the average variable cost, the following shall be taken into consideration:

1. Whether the act would exclude the competitors of the dominant person from the market.
2. Whether the act would will prevent the potential competitors of the dominant person from entering the market.
3. Whether the dominant person would be able to increase prices after excluding its competitors from the market or preventing potential competitors from entering it.
4. Whether the act is conducted for an amount of time sufficient to result in any of the above-mentioned effects.

j) Imposing an obligation on the dominant person's supplier to refrain from dealing with its competitors. The obligation not to deal is considered the refusal by the supplier to deal with the dominant person's competitor, fully or partially, in a manner that threatens his continuance in the market, leads to its exit, restricts its freedom of competition, or prevents its entry in the market.

Examples of practices that constitute an abuse of a dominant position



Exclusivity:
The dominant person imposes on its customers to purchase certain quantities that would fulfill most of their needs. This could lead to the exclusive distribution of the dominant person's products and the exclusion of those of its competitors.



Refusal to deal:
The dominant person refuses to provide an essential facility for a competitor to enter the market.



Margin squeeze:
: A vertically-integrated person that is dominant in the upstream market provides its own product to its competitors in the downstream market at high prices, which increases their production costs. Meanwhile, the dominant person lowers the prices of its own product in the downstream market.



Predatory Pricing:
The dominant person provides products at a price below their marginal cost or average variable cost during a specified period of time.



Loyalty Rebates:
The dominant person grants loyalty rebates that would lead customers to purchase all or most of their needs from it exclusively. Retroactive rebates are the most harmful forms of rebates. Upon reaching a certain limit of purchases, a discount is applied on all the quantities purchased during a period of time.



Tying:
The dominant person makes the conclusion of a contract or agreement of a product subject to acceptance of obligations or products which, by their nature or commercial usage, are not related to the product subject of the agreement, contract or original deal.

What is the penalty for violating Article 8 ECL?

Article (22) ECL stipulates that violations of Article (8) of ECL shall be punished "by a fine of not less than **one percent of the gross revenues of the product subject to the violation, and not exceeding ten percent of the aforementioned gross revenues,** within the violation period. In case of the inability of calculating the aforementioned revenues, the penalty shall be a fine of not less than **one hundred thousand Egyptian Pounds, and not exceeding three hundred million Egyptian Pounds."**



An example of a violation of Articles 8(a), 8(d) and 8(g)

ECA received a complaint by a consumer, alleging that they were forced to switch from one satellite to another in order to access specific subscribed sports channels. ECA also received another complaint, alleging that the same company bundled unrelated sports events together in subscription packages.
ECA established the following findings:

- Each one of the sports events is a separate relevant market, and that the satellite channel company holds a dominant position in each and all these markets.
- The tying of the different events is a violation of the provisions of Article 8(d) ECL, since each event is a separate product market. For instance, no viewer could follow all the bundled events due to conflicting broadcast times.
- The tying of the seasonal events with other events is a violation of Article 8(d) ECL, since during the time of seasonal events; the league events were suspended. This was considered to be forcing the viewer to subscribe to events that they may not be interested in, and preventing them from choosing the events they would like to subscribe to.
- The satellite channel company also abused its dominant position by restricting competition between satellites, as it imposed on existing and new subscribers to shift to another satellite in violation of Articles 8(d) and 8(g) ECL.

Therefore, ECA's Board of Directors issued its decision that the satellite channel company violated Articles 8(d) and 8(g) ECL. The Board requested the initiation of criminal proceedings against the satellite channel company, pursuant to Articles 20 and 21 ECL, and imposed a set of administrative orders against the company. The Economic Court imposed a fine of Four hundred million EGP on the company, which was upheld by the Court of appeal and the Court of cassation.

An example of a violation of Articles 8(a) and 8(b)

ECA received a complaint filed by several consumers and a telecommunication company against one telecommunication company, herein referred to as the Telecom Company. The complainants alleged that the Telecom Company cut off the internet services from their customers without prior notice and without providing them with an alternative, as well as forcing customers to deal with them. These practices would restrict competition in the market and prevent internet companies from carrying out their economic activity.

ECA established that the Telecom Company prevented its competitors from providing their services, by implementing repairs to the infrastructure without prior notice or agreement with the internet service providers, which was considered a violation of Article 8(a) ECL. In addition, it was established the Telecom Company engaged in a constructive refusal to deal with its competitors (unusual arbitrary conditions for the provision of the infrastructure), in violation of Article 8(b) ECL.

It is worth noting that such practices resulted in preventing undertakings operating in the market from providing internet services to customers using fiber-optic cable network. The companies reported the loss of 71,000 customers, as well as financial losses amounting to EGP 9,400,000 per month during the period of the violation.

ECA's Board of Directors concluded that the Telecom Company violated Articles 8(a) and 8(b) ECL.

How to comply with the provisions of Article 8 ECL

Any person holding a dominant position shall ensure not to carry out any acts that would harm competition, including, but not limited to, ensuring the following:

- Not setting prices below the average variable cost.
- Not following pricing policies that would restrict competition in the market.
- Not setting discriminating prices or conditions between suppliers or customers in similar contractual positions.
- Not imposing on customers to purchase a product or service as a requirement for purchasing another unrelated product or service.
- Not dealing exclusively with a distributor or a customer.
- Not undertaking any act that would lead to exclusive dealing, such as quantity forcing.
- Not dealing exclusively with a supplier.
- Not preventing a supplier from dealing with a competitor.
- Not setting contractual terms that would restrict competition in the market.
- Not refusing dealing with a customer or supplier without an objective justification.
- Not to arbitrarily stop dealing with a customer or supplier.
- Not setting resale price maintenance.
- Avoid most favored nation clauses.

4

Notifying ECA of Economic Concentrations - Article 19 ECL

According to ECL and its Executive Regulations, persons whose annual turnover exceeds EGP 100 million must notify ECA of the economic concentrations within thirty days of the closing date of the legal transaction. The obligation to notify falls on:

- The person that acquires assets, property or usufructuary rights, shares of another person, or any action resulting in the joint management of two or more persons;
- or the person resulting from this economic concentration.

The persons should fill out the form available on ECA's website and submit it to ECA along with the required documents, within the legal deadline.

What is the penalty for violating Article 19 ECL?

Article 22 bis of ECL stipulates that whoever fails to submit the notification prescribed in the second paragraph of Article 19 of ECL shall be punished: "by a fine of **not less than twenty thousand Egyptian Pounds and not exceeding five hundred thousand Egyptian**

Example of failure of notify ECA of an economic concentration

A Cement Company did not notify ECA of its acquisition of shares in another cement company operating in the Egyptian market. Accordingly, criminal proceedings were initiated and the company was referred to the Public Prosecution.

The undertaking settled with ECA and paid the prescribed amount.

Article 19 para. 2:

"Persons whose annual turnover of the last financial statements exceeded one hundred million pounds shall notify the Authority upon their acquisition of assets, proprietary or usufructuary rights, shares, establishment of unions, mergers, amalgamations, appropriations, or joint management of two or more persons".

What are the violations related to ECA enforcement powers?

Obstructing ECA's work while investigating practices and conducting studies

Article 11 para. 3 and Article 17 ECL

Non-Compliance with ECA's Decisions

During and after investigation of the violation



Person Undertakings should not obstruct ECA's work during investigating practices and conducting studies

Article 11 para. 3

Failure to submit requested data and documents

Article 17

Preventing ECA's employees from performing their work during dawn raids

Article 11:

Failure to respond to requests for data and documents issued by ECA

In order for ECA to fulfill its mandate in ensuring an effective competitive environment and preventing anticompetitive practices in the markets, ECA develops an updated database on economic activity and conducts specialized studies to detect anticompetitive practices in different markets.
Accordingly, all persons are obligated to provide ECA with the requested data and documents. The data and documents should be correct and provided within the deadline set forth by ECA. Otherwise, the persons will be subject to legal penalties.

Article 11 para. 3 ECL stipulates: "All persons shall provide ECA with the required data, papers or documents necessary to perform its mandate, within the specified dates."

What is the penalty for failing to provide the requested data and documents?
Article 22 bis ECL states: "Shall be punished by a fine of not less than twenty thousand Egyptian Pounds and not exceeding five hundred thousand Egyptian Pounds any person who: (…) 2- Refrains from providing ECA with any data, papers, or documents".
What is the penalty for providing ECA with incorrect data and documents?
Article 22 bis (A) ECL stipulates that: "Without prejudice to any more severe punishment, the penalty shall be a fine of not less than fifty thousand Egyptian Pounds and not exceeding one million Egyptian Pounds in case that false data, papers, or documents were knowingly provided to the Authority".

Example of failure to respond to data requests

The Cairo Economic Court imposed a fine of EGP 100,000 on a telecommunication company for its failure to provide the data and documents requested by ECA during the period granted, in violation of ECL. The court decision was also upheld by the Cairo Economic Court of Appeal.

How to comply with the provisions of Article 11 para. 3 ECL?

- Provide ECA with complete data, papers and documents requested to enable ECA to fulfill its mandate.
- Provide ECA with the correct data and information.
- Abide by the deadlines set by ECA without delay.
- Abide by the form in which ECA requests the data to be provided (for example: data in tables, numerical data, etc.).
- Contact ECA immediately in the event of being unable to submit the requested data or having any inquiries regarding the requested data.



Article 17 : Obstructing ECA's work during dawn raids

ECL grants ECA's employees the status of law enforcement officers, which gives them the right to request and review records and documents and to obtain the necessary information and data.

Article 17 ECL stipulates that: "ECA employees, (…) shall be granted the status of law enforcement officers in applying the provisions of this Law. These employees shall be entitled to review records and documents, as well as to obtain any information or data from any governmental or non-governmental entity for the purpose of investigating cases considered by the Authority".

Article 38 of the Executive Regulations states: "ECA employees, who are granted the status of law enforcement officers, shall be given the right to carry out the following procedures after revealing their identity and presenting it to the concerned party:

1. Reviewing records and documents, as well as obtaining any information or data from any governmental or non-governmental entity, for investigating cases considered by ECA.
2. Entering the work premises of the persons subject of the investigation during official working hours, They can be assisted by Law Enforcement Officers when required.
3. Carrying out the necessary procedures of gathering evidence necessary for the investigation and questioning any person regarding any violations of the provisions of the Law".

What is the penalty of obstructing ECA's employees from performing their work?

Article 22 bis (B) ECL states: "Without prejudice to any more severe punishment provided by any other law, whoever prevents the employees of the Authority, holding the status of law enforcement officers, from proceeding with any of the acts stipulated in the second paragraph of Article 17 of this Law, shall be punished by a fine not less than twenty thousand Egyptian Pounds, and not exceeding five hundred thousand Egyptian Pounds".

ECL penalties are personal and are imposed on the natural person. Article 25 stipulates that: "The person responsible for the actual management of the juristic person in breach shall be subject to the same penalties stipulated for the acts committed in breach of the provisions of this Law, if it has been established that such person had actual knowledge of such breach and if his default on assuming the duties of his office as the responsible manager has contributed to the breach.

The juristic person shall be jointly liable for the payment of the fines and compensation ruled, if the breach has been committed by one of its employees, acting in the name or on behalf of the juristic person".

An example of obstructing ECA's work during dawn raids

The Cairo Economic Court, in its ruling dated 27 March 2017, imposed a fine of EGP 100,000 on a distribution company of medical supplies for preventing ECA from accessing the documents and data requested during a dawn raid.

How to comply with the provisions of Article 17 ECL

- Allow law enforcement officers to enter the work premises.
- Instruct all employees to fully cooperate with the law enforcement officers.
- Allow ECA law enforcement officers to question employees at the work premises and write official meeting minutes.
- Submit all the requested softcopies and hardcopies of documents and files without any kind of manipulation or hiding of documents.
- All employees should stay at their offices to ensure order in the premise until ECA has completed its mission.

1. Non-Compliance with ECA's Decisions

During investigation

A decision to issue interim measures to cease any practices that are a prima face violation of the provisions of ECL

The Objective
Avoiding irreversible and serious damage to competition or to the consumer

After investigation

A decision to order the violator to cease and desist the violation

The Objective
Remedy anti-competitive practices in the market

2. Non-Compliance with the decisions issued during the investigation of the violation

Upon detecting and establishing anticompetitive practices in violation of ECL, ECA's Board of Directors shall issue its decision according to the nature and severity of the violation.
Article 20 para. 2 ECL states that ECA may issue interim measures to cease any practices that may be in violation of articles (6), (7), or (8) ECL, if ECA considers that such practices would result in a serious and irreversible damage to competition or to the consumer.

Article 20 para. 2

"The Board may issue a decision, with the majority of votes, to cease the practices that constitute a prima facie violation of the provisions of Articles 6, 7 or 8, for a certain period of time, if these practices would cause serious and irreversible damage to competition or to the consumer."

An example of imposing interim measures on companies

ECA received two complaints alleging the occurrence of several anticompetitive practices by an alcoholic beverages company. During the investigation, ECA found that such practices would cause serious and irreversible damage to competition and to the consumer, if such practices were not ceased before a final decision is issued.
Accordingly, ECA Board of Directors issued a decision ordering the alcoholic beverages company to cease these practices immediately pursuant to the provisions of article 20 para. 2 ECL.

3. Non-Compliance with ECA's decisions issued after the investigation

In case of establishing a violation to any of the provisions of Articles (6), (7) or (8), **ECA shall issue a decision ordering the violator to cease and desist the violation,** according to Article 20 para. 1 ECL.

Article 20 para. 1 ECL

"Upon establishing a breach of any of the provision of Articles 6, 7 and 8 of this Law, the Authority shall order the violator to cease and desist the violation immediately or within a period of time to be specified by the Board; otherwise the agreement or contract in breach shall be considered void".

An example of ordering companies cease and desist the violation

ECA received a complaint against an advertisement and events company, alleging that the latter is the only marathon organizer in Luxor and was forcing marathon runners to reside in a specific hotel as a condition for their participation in the marathon, which would have caused the participants to incur additional expenses. This occurred despite the fact that the basic services for organizing marathons included only getting the race start number (participant number), road services for the participant, healthcare services, and proof of participation in the race (such as a medal or race certificate).

ECA established that the company violated the provisions of Article 8(d) ECL. It was found that the undertaking tied the service of organizing and participating in Luxor Marathon races, with the racer's accommodation at a specific hotel; which directly harmed the consumer as well as competition in the market of the tied product (i.e. hotels).

In this regard, ECA's Board of Directors imposed administrative measures on the company, namely:

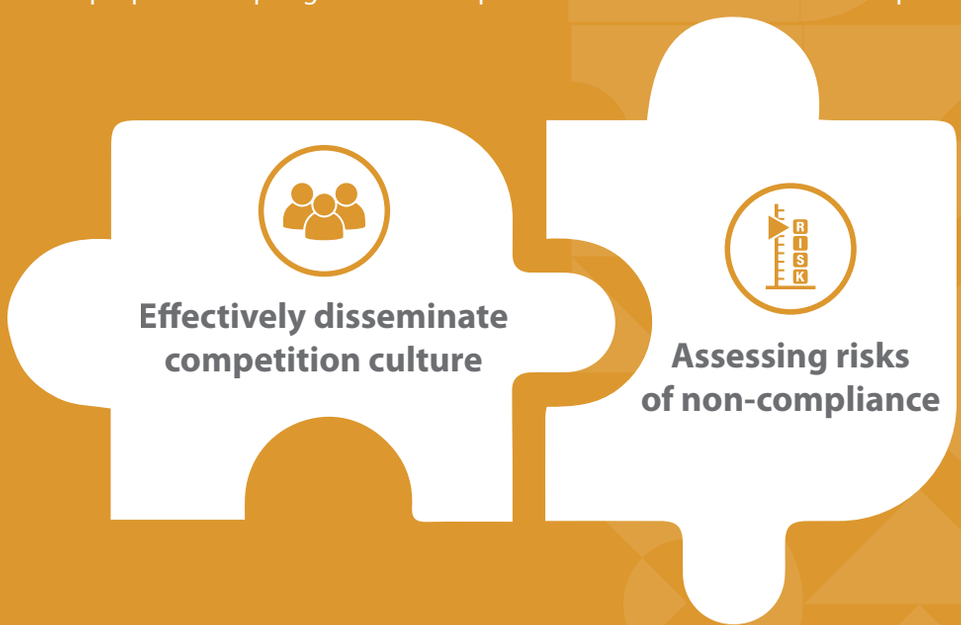
- Immediately ceasing and desisting the violation of the tying between the participation in the Luxor International Marathon Race and the hotel accommodation services.
- Opening the participation in the Luxor International Marathon Race for all applicants to obtain the full services, including the participation in the race, the race start number (participant number), healthcare services, road services for the racer, proof of the participation of the runner, whether with a medal or a certificate at the value estimated initially by the company, without imposing any additional expenses on the applicant, provided that any additional offers or services should be optional for participants.
- Notifying ECA of its actions to cease and desist the violation.
- Ensuring compliance with ECL when organizing any competitions in the future.



II

Proposed measures for Compliance with ECL Provisions

Companies can introduce a department or appoint a person to be responsible for facilitating compliance with ECL. Having this department or compliance officer aids in the dissemination of competition culture within the company, as they contribute to raising employee awarness on the benefits of competition in general, as well as, the benefits of compliance to ECL in particular to avoid violations. Therefore, the Compliance toolkit proposes adopting measures to promote the dissemination of competition culture.



Identifying the objectives of compliance with ECL

Identifying the advantages of compliance with ECL helps motivate employees to apply free market mechanisms and not to carry out any anticompetitive practices in the market.



Promoting a competition culture starting from the top

Directors and Chief Executives must comply with ECL, as they are considered role models for employees.

They must disseminate and promote the values of competition among employees, where freedom of competition must be one of the pillars of the company's policies, as well as part of its vision and mission.

It is also recommended to conduct training workshops on competition policies for employees from time to time, in order to avoid carrying out any anticompetitive practices.

Recognizing and assessing the disadvantages of non-compliance

Companies should study and identify the risks of non-compliance in order to ensure optimal allocation of their resources, as they could be negatively affected by the existence of a violation.

Risk Assessment Calculate your risks

First Step: Identify the risks

Identifying the risks of violating ECL is important. The first step to follow is researching and identifying the areas of the company's business that are prone to anticompetitive practices.

For instance, the following steps are advised to be followed:

- Studying and reviewing the behavior of the company and its employees Are there any employees who are likely to be in contact with competitors as a result of the nature of their work? Are there mechanisms that facilitate the process of agreement with competitors (especially regarding meetings in trade associations or regarding public procurement)?
- Studying and reviewing any existing or potential agreements Are there any agreements between the company and its competitors or suppliers that may violate the provisions of articles 6, 7, or 8 ECL?

Second Step: Analyze the risks

After identifying the risks, the company must analyze and evaluate the risks and rank such risks according to the degree of harm to competition in the market.

For instance, the following steps are advised to be followed:

- Appoint an officer responsible for compliance to ECL provisions to analyze the risks and follow steps three and four.

Third Step: Manage the risks

Once the risks have been assessed and ranked, the next step is to develop the necessary policies and procedures to mitigate and address them.



For instance, the following steps are advised to be followed:

- Train and educate employees on the importance of compliance with ECL, as well as how to avoid any anticompetitive practices (this should include, in particular, employees who attend meetings of trade associations, and those involved in public procurement).
- Take action to cease any practices that potentially violate the provisions of ECL.

Fourth Step: Monitor the risks

Undertakings should review the previous steps on a regular basis in order to ensure that no new risks arise that may harm competition.

For instance, the following steps are advised to be followed:

- Reviewing the behavior of the company and its employees on an annual basis
- Reviewing the existing or potential agreements on an annual basis
- Training employees repeatedly on an annual basis, as well as training newly hired employees.



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